

SCOTTISH MARITIME PRACTICE

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BY

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ADVOCATE

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P R E F A C E.

It is hoped that a text-book devoted entirely to the practice and procedure of the Scottish Courts in maritime law may be of value. Since the appearance of Bell's Commentaries at an early period of last century, this subject has never been treated in any detail, and for obvious reasons that work is now, in many respects, unreliable. It may no doubt be stated as a general proposition that the principles of maritime law are universal, and the same in Scotland as in England, and, in view of the comprehensive manner in which that subject has already been treated in a number of standard works in England, it might appear that separate treatment in Scotland was unnecessary. Uniformity of principle, however, does not necessarily imply uniformity of practice, and, for a variety of reasons, English authorities are not always satisfactory substitutes for a purely Scottish text-book. Thus it has been pointed out that the Scottish Courts are at perfect liberty to place their own construction upon the principles of the maritime law, and are in no sense bound by the decisions of corresponding tribunals in England. It is further the case that maritime law does not form a complete code in itself, but requires to be constantly supplemented by and applied in the light of the common law of any State in which it is administered. In such circumstances English authorities are frequently of little value, and may be misleading. This is notably the case in the region of procedure in which the difference between Scottish and English practice is most pronounced. Thus in Scottish procedure there is no form of action corresponding in any way to that of the English action *in rem*, and for this reason the application of maritime statutes, framed primarily with reference to procedure in the English action *in rem*, is in Scotland frequently uncertain. Similar difficulties arise owing to differences in the nature of the jurisdiction of the Courts which are called upon to apply the maritime law in the two countries. For such reasons it is thought that separate treatment is justified. The subject-matter of the book is primarily the practice and procedure of the Scottish Courts in so far as these are distinguishable from English procedure and practice, but

it also aims at pointing out such conflict of authority as has arisen in matters of principle. Frequent reference is made to English decisions in cases where authority is absent in Scotland, and where it is thought that such decisions would be followed or might be helpful.

The book is mainly concerned with maritime causes in which the Scottish Courts exercise their Admiralty jurisdiction. Part I. deals with those rules of practice and procedure which are of general application in all maritime causes. In Part II. maritime causes are considered particularly and in detail. In Part III. a short sketch of the practice, procedure, and jurisdiction of the special shipping Courts as established by the Merchant Shipping Acts has been given. Although such Courts are not domestic tribunals, they are, in Scotland, generally conducted by Scottish judges, and their inclusion appeared to be appropriate.

The author is greatly indebted to Mr. Douglas Jamieson, advocate, for kindly reading the proof sheets. By his suggestions he has contributed materially to the value of the book. Mr. John Carmont, K.C., has kindly authorised the publication of the form of summons in an action *in rem*, of which he is the originator, which is printed in the Appendix. By the interest taken in the progress of the work by Mr. William Mitchell, K.C., and others the author has been encouraged in the belief that a text-book on the lines indicated may be of some practical utility to the practitioner in this branch of law.

EDINBURGH, *February*, 1926.

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Adm. & Ec.	- - -	Law Reports, Admiralty and Ecclesiastical, 1865-1875.
App.Cas.	- - -	Appeal Cases, 1875-1890.
Asp. M.L.C.	- - -	Aspinall's Maritime Law Cases from 1870. Abbott's Law of Merchant Ships and Seamen.
B. & Ald.	- - -	Barnewall and Alderson's King's Bench Reports, 1817-1822.
B. & P.	- - -	Bosanquet and Pullar's Common Pleas Reports, 1797-1804.
B.W.C.C.	- - -	Butterworth's Workmen's Compensation Cases.
Br. & L.	- - -	Browning and Lushington's Reports, 1863-1865.
Bank., Inst.	- - -	Bankton's Institute of the Law of Scotland.
Bell's Cas.	- - -	Robert Bell's Cases in the Court of Session (Octavo), 1790-1792, (Folio), 1794-1795.
Bell, Comm.	- - -	G. J. Bell's Commentaries on the Law of Scotland. Bell's Commentaries on Statutes.
Bell, Prin.	- - -	G. J. Bell's Principles of the Law of Scotland. Boyd's Judicial Proceedings.
(C.A.)	- - -	Court of Appeal.
C.B.	- - -	Common Bench Reports, 1846-1856.
C.B. (N.S.)	- - -	Common Bench Reports, New Series, 1856-1865.
C.C.R.	- - -	Law Reports, Crown Cases Reserved, 1865-1875.
C.P.	- - -	Law Reports, Common Pleas, 1865-1875.
C.P.D.	- - -	Law Reports (Common Pleas Division), 1875-1880.
C. Rob.	- - -	Christopher Robinson's Reports, 1798-1808.
Ch. -	- - -	Law Reports, Chancery, since 1891.
Ch.D.	- - -	Law Reports, Chancery Division, 1876-1890.
Com. Cas.	- - -	Commercial Cases.
D. -	- - -	Dunlop's Court of Session Reports, 1838-1862.
Dods.	- - -	Dodson's Reports, 1811-1822.
Dow	- - -	Dow's House of Lords Reports, 1812-1818.
El. & Bl.	- - -	Ellis and Blackburn's Queen's Bench Reports, 1852-1857
Eng. & Ir. App.	- - -	Law Reports, English and Irish Appeals, 1866-1875.
Ersk. Inst.	- - -	Erskine's Institute of the Law of Scotland.
Ex. -	- - -	Exchequer Reports, 1847-1856.
Ex.D.	- - -	Law Reports, Exchequer Division, 1875-1890.
F. -	- - -	Fraser's Court of Session Reports, 1898-1906.
F.C.	- - -	Faculty Collection of Court of Session Reports, 1752-1841.
Fo. -	- - -	Folio.
		Fulton's Sovereignty of the Seas.
Giff.	- - -	Giffard's Vice-Chancellor's Court Reports, 1857-1865. Gloag on Contract.
Guthrie's Sh.Ct.Rep.	- - -	Guthrie's Sheriff Court Reports.
H.L.	- - -	Law Reports, English and Irish Appeals, 1866-1875.
(H.L.)	- - -	House of Lords Decision, Scottish Reports.
Hagg. Adm.	- - -	Haggard's Admiralty Reports, 1822-1838. House of Lords Orders.

Ir. L.T.R.	- -	Irish Law Times Reports.
Ir. Rep.	- -	Law Reports, Ireland.
(J.)	- -	Court of Justiciary Decision, Scottish Reports.
Jur.	- -	Jurist Reports, 1837-1854.
Jur. Styles	- -	Juridical Styles.
K.B.	- -	Law Reports, King's Bench, since 1891.
K. & J.	- -	Kay and Johnson's Vice-Chancellors' Court Reports. Kennedy's Law of Civil Salvage.
L.J. Adm.	- -	Law Journal, Admiralty.
L.J. Ch.	- -	Law Journal, Chancery.
L.R. Ch.	- -	Law Reports, Chancery Appeal Cases, 1866-1875.
L.R. Eq.	- -	Law Reports, Equity Cases, 1865-1875.
L.R. Ex.	- -	Law Reports, Exchequer Cases, 1865-1875.
L.T.	- -	Law Times Reports.
Lush.	- -	Lushington's Reports, 1859-1862.
M.	- -	Morison's Dictionary of Court of Session Decisions, 1532-1816.
M. (with numeral prefixed)		Macpherson's Court of Session Reports, 1862-1873.
M.L.C.	- -	Maritime Law Reports, 1860-1871.
M. & S.	- -	Maule and Selwyn's King's Bench Reports, 1813-1817.
Macq.	- -	Macqueen's House of Lords Reports, 1851-1865.
Mee. & Wels.	- -	Meeson and Welsby's Exchequer Reports, 1836-1847. Minutes of the Faculty of Advocates.
Moo. P.C.C.	- -	Moore's Privy Council Cases.
Mor. Bky. Cases	- -	Morrell's Bankruptcy Reports. Mackenzie's Observations on the Acts of Parliament. Marsden's Collisions at Sea. Marsden's Select Pleas of the Admiralty.
(N.S.)	- -	New Series. Notes of Cases, 1841-1850.
(O.H.)	- -	Outer House Decision, Scottish Reports.
(O.S.)	- -	Old Series. Orders in Council.
P.	- -	Law Reports, Probate, since 1891.
P.C.	- -	Law Reports, Privy Council Appeals, 1865-1875.
P.D.	- -	Law Reports, Probate Division, 1876-1890. Park's System of Marine Insurances. Pritchard's Admiralty Digest.
Q.B.	- -	Law Reports, Queen's Bench, since 1891; Queen's Bench Reports, 1841-1852.
Q.B.D.	- -	Law Reports, Queen's Bench Division, 1876-1890.
R.	- -	Rettie's Court of Session Reports, 1873-1898. Report by the Assessor and Clerk of the River Bailie Court to the Magistrates of Glasgow, 30th March, 1900. Roscoe's Admiralty Practice. Rules of the Court of Survey, 1876. Rules of the Supreme Court.
S.	- -	Shaw's Court of Session Reports, 1822-1838.
S.C.	- -	Court of Session Cases, since 1907.
S.L.R.	- -	Scottish Law Review.
S.L.T.	- -	Scots Law Times.
S.N.	- -	Session Notes.
(S.P.)	- -	Session Papers.

LIST OF ABBREVIATIONS.

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Scot. Jur.	-	-	Scottish Jurist, 1829-1873.
Sh. Ap.	-	-	Shaw's House of Lords Reports, 1821-1824.
Sh. & MacL.	-	-	Shaw and MacLean's House of Lords Reports, 1835-1838.
(Sh. Ct.)	-	-	Sheriff Court Decision.
Sh. Ct. Rep.	-	-	Scottish Law Review, Sheriff Court Reports.
Swa.	-	-	Swabey's Reports, 1858-1859.
			Scots Style Book.
			Shipping Casualties Appeals and Re-hearings Rules, 1923.
			Smith's Maritime Practice.
Spinks	-	-	Spinks' Ecclesiastical and Admiralty Reports, Easter, 1853, Mich., 1855.
Stair, Inst.	-	-	Stair's Institutions of the Law of Scotland.
T. L. R.	-	-	Times Law Reports.
W. R.	-	-	Weekly Reporter.
W. & S.	-	-	Wilson and Shaw's House of Lords Reports, 1825-1834.
W. Rob.	-	-	William Robinson's Reports, 1838-1850.
			Welwood's Sea Lawes of Scotland.

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| <p>2 & 3 Geo. V. c. 31—Pilotage Act, 1913, pp. 90, 170, 171, 173, 282, 352, 391.</p> <p>4 & 5 Geo. V. c. 50—Merchant Shipping (Convention) Act, 1914, pp. 64, 321.</p> <p>4 & 5 Geo. V. c. 59—Bankruptcy Act, 1914, p. 145.</p> <p>6 & 7 Geo. V. c. 41—Merchant Shipping (Salvage) Act, 1916, p. 214.</p> <p>10 & 11 Geo. V. c. 8—Administration of Justice Act, 1920, p. 186.</p> <p>10 & 11 Geo. V. c. 80—Air Navigation Act, 1920, pp. 207, 215.</p> <p>11 & 12 Geo. V. c. 28—Merchant Ship-</p> | <p>ping Act, 1921, pp. 118, 267, 291, 292.</p> <p>12 & 13 Geo. V. c. 39—Oil in Navigable Waters Act, 1922, p. 56.</p> <p>13 & 14 Geo. V. c. 40—Merchant Shipping Acts (Amendment) Act, 1923, p. 111.</p> <p>13 & 14 Geo. V. c. 42—Workmen's Compensation Act, 1923, pp. 105, 106.</p> <p>14 & 15 Geo. V. c. 22—Carriage of Goods by Sea Act, 1924, pp. 197, 198, 201, 204.</p> <p>15 & 16 Geo. V. c. 37—Merchant Shipping (Equivalent Provisions) Act, 1925, p. 119.</p> |
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ERRATA ET ADDENDA.

Page 62, reference 22.

For Bank. Instit., 4, 41, 9, read Bank. Instit., 4, 12, 9.

Page 270, line 19.

This provision of the Merchant Shipping Act, 1894, has been amended by the Merchant Shipping (International Labour) Act, 1925, (15 & 16 Geo. V. c. 42), sec. 1, which provides for the payment of wages on certain conditions for a period of two months from the date of the termination of the service.

Page 358—Act of Sederunt, 20th December, 1924.

The Act of Sederunt, 29th January, 1926, which supersedes this Act of Sederunt, is in the same terms so far as regards accidents occurring at sea and detention of ships.

INTRODUCTION.

HISTORY OF THE ADMIRALTY JURISDICTION IN SCOTLAND.

I.

THE COURT OF ADMIRALTY.

THE earliest Courts to exercise a maritime jurisdiction in Scotland appear to have been the Courts of the water bailies of the maritime burghs. In his "Sea Laws of Scotland," notable as the first textbook of maritime law to be printed in Great Britain, William Welwood states that—" . . . in "Scotland before the erection of our Admirall after the "example of other nations the Deans of Guild were ordinary "judges in civil debates betwixt mariner and merchant, as "the water bailie betwixt mariner and mariner, like as the "High Justice was judge in their criminals, which actions "~~all now falling furth betwixt~~ the persons foresaid of due "appertain to the jurisdiction of the Admirall."¹ Whatever may have been the nature of the jurisdiction of these maritime Courts, it was at an early date superseded by that of the Court of Admiralty, which exercised the judicial functions of the Admiral of Scotland. The jurisdiction of the Court was at once civil, criminal, and in prize.

Its civil jurisdiction doubtless originated, as appears to have been the case in England, in the trial of claims of spoil, *i.e.*, claims brought by or against foreign sovereigns for the restitution of ships or goods captured at sea, in which the common law Courts were unable to give proper redress.² Instituted for this purpose, its jurisdiction rapidly developed. Since the commission of the Admiral was issued directly by

¹ Chap. II.

² Cf. *Select Pleas of the Admiralty*, vol. i., Introduction, p. xiv.

the Crown, and not through Parliament, the jurisdiction of the Admiral's Court was of a peculiarly equitable character, and it administered, not the common law of the realm, but the general maritime law. Its procedure was essentially summary and expeditious as contrasted with that of the Session, the supreme Court of common law, which met only once in the year, in each of the three principal towns of Edinburgh, Perth, and Aberdeen, and in which procedure was dilatory, and actions were raised on the extended *inducia* of forty days.³ Moreover, owing to the fact that persons resident abroad are outwith the jurisdiction of the common law Courts, and can generally only be made subject to it by the arrestment of a ship temporarily present within the jurisdiction, the jurisdiction of the Court was regarded as specially applicable to foreigners. In early times bills of exchange were generally either drawn or payable abroad, and in claims by or against foreigners arising on these or on bills of lading or charter parties the Court recognised and applied the law merchant, much earlier and more fully than the common law Courts. For these reasons the Court at once became popular as a commercial tribunal, and early acquired an extensive jurisdiction, not only in proper maritime causes, but also by usage in claims of a general mercantile character.

The precise date of establishment of the Court and its early history are uncertain. The first person known to have held the office of Admiral appears to have been the second Earl of Orkney, who died in 1417, and it is probable that the jurisdiction of the Court developed during the fifteenth century. At first it required to be "fencit and haldin within the flude "mark of the sea,"⁴ i.e., within the actual limits of the Admiral's jurisdiction, but it soon commenced to sit regularly in Edinburgh, probably in the Tolbooth. Its earliest records are the *Acta Curiae Admirallatus Scotiae*, 1557-1562, preserved in the Register House. In 1567 it is referred to as

³ Act 1457, c. 3.

⁴ Balfour's Practiques : Sea Laws, chap. LXXXIV.

one of the Courts permanently established in Edinburgh,⁵ and a table of fees authorised for it by the Privy Council in 1606 shows that it was then already a regularly constituted Court, with its own officers and forms of process.⁶ At first the Admiral presided in person, but he later acquired the right of appointing a deputy known as the Judge Admiral, who received his commission directly from him.

The institution of the Court of Session in 1532 at once led to a conflict of jurisdictions. The Court of Session declined to recognise the independent jurisdiction of the Court of Admiralty, and in 1543, in a case of spoil, the judges of the Court of Session expressly held that they were competent judges in the cause, although *ex gratia* they invited the Admiral to sit with them and exercise a vote.⁷ It was apparently in consequence of this decision that in the following year the Admiral represented to Parliament that his jurisdiction was being usurped by the Court of Session, and, in consequence, a special diet was fixed to enable the Admiral and the Lord Advocate to substantiate the respective claims of the Court of Admiralty and of the Court of Session.⁸ On the same date, while this conflict was still pending, Parliament of consent appointed a date for the hearing of a claim of spoil by the Admiral himself, but nominated five assessors to sit with him, in whom were included the Lord Clerk-Register, the Lord Justice-Clerk, and the Lord Advocate.⁹

This conflict of jurisdiction continued throughout the history of the Court, and was attributable mainly to two causes. It was the theory of Scots law that a definite region of maritime territory, which was limited only by the range of vision, lay within the realm.¹⁰ For this reason it was contended that the authority of the common law did not

⁵ Act 1567, c. 50.

⁶ Register of Privy Council, vol. vii., p. 175.

⁷ *Flemings v. Lord Bothwell*, 1543, M. 7322.

⁸ Acts of the Parliaments of Scotland, ii., 449.

⁹ Acts of the Parliaments of Scotland, ii., 450.

¹⁰ See *infra*, p. 5.

terminate, as it did in England, at the flood mark, but extended throughout the maritime territory, and accordingly when, in 1532, the Court of Session was established by James V. to be "ane permanent ordour of justice for the universal wele of all his lieges,"¹¹ it was claimed that its jurisdiction was intended to include the maritime territory, and to be superior therein to that of the Admiral. In the second place, the distinction between maritime causes in which the Court of Admiralty claimed to have a privative jurisdiction in any event in the first instance, and non-maritime mercantile causes, in which the superior jurisdiction of the Court of Session was conceded, was never clearly defined, and for this reason the Court of Session was able to advocate both maritime and non-maritime causes alike, on the ground that they were outwith the Admiral's jurisdiction.

In 1609 the powers of the Court of Admiralty were extended. Hitherto it had had no power of putting its own decreets into execution. By the Act of 1609, c. 22, however, it was declared that the Court was a "souverane judicatorie," and it was provided that hornings might pass on the decreets of the Admiral without the decreets conform of the Court of Session, which had hitherto been required to enable execution to proceed. It has, however, been pointed out that the declaration that the Court was a "souverane judicatorie" did not necessarily imply that it was independent of the Court of Session, but merely that it had the power of reviewing its own decreets and those of its depute judges.¹² In any event, the practice of advocating causes to the Court of Session continued as formerly. In 1681 a further effort was made to define the relationship of the two Courts. By the Act of 1681, c. 82, the declaration that the Court of Admiralty was a "souver-
"aigne judicature" was repeated, and it was further declared that the Admiral had a privative jurisdiction in the first instance "in all maritime and seafaring causes forreigne

¹¹ Act 1532, c. 2.

¹² Mackenzie's Observations on the Acts of Parliament, p. 334.

“ and domestick whether civil or criminal whatsoever within
“ this realme and over all persons as they are concerned in
“ the same.” Advocation in maritime causes was prohibited,
but a right of appeal to the Court of Session was allowed by
bills of suspension, which were to be heard summarily and to
receive special priority over other causes. The material distinction between procedure by suspension and the former procedure by advocation appears to have been that in the former case the appeal lay rather to the equitable jurisdiction of the Crown inherent in the Lord Chancellor, who at that date sat on occasion in the Court of Session, than to the common law jurisdiction of the Court.¹³ Although the prohibition of the advocation of maritime causes was the “ great design ” of the Act of 1681, it has been pointed out by Sir George Mackenzie, who, as Lord Advocate at that date, was responsible for the Act, that this object entirely failed, since the Act omitted to define the nature of a maritime cause, and advocation of such causes continued on the ground that they were non-maritime.¹⁴ In endeavouring to terminate the delay in procedure caused by the advocation of maritime causes to the Court of Session, and the consequent expense, delay, and dislocation of trade suffered by the shipping community, the Act of 1681 appears to have formed part of a larger scheme for stimulating the foreign trade and shipping interests of the country, which at the period of the Act were in a depressed condition, and were engaging the close attention of the Committee of Trade of the Scottish Parliament. The Act itself expressly bore to be designed for “ the advancement and encouragement of trade and navigation.” It is not unreasonable to ascribe its inception to the Duke of York, afterwards James II. At this date the Duke of York was Admiral, not only of England, but also of Scotland, and during the two years immediately preceding the passing of the Act he had frequently resided in Scotland for considerable

¹³ Ross's Lectures on the Law of Scotland, i., 360.

¹⁴ Observations on the Acts of Parliament, p. 462.

periods, and had been a regular attender at the meetings of the Scottish Privy Council. By a letter to the Privy Council, dated 21st April, 1680, the King had recommended that the power of granting passes and safe conducts to ships should be exclusively assigned to the Admiral in Scotland—a recommendation which was actually embodied in the Act—and had suggested that it should be left to the discretion of the Admiral to issue such directions as might be effectual to secure the trade of the realm and prevent future abuses.¹⁵ The Act appears to have been intended to give effect to these recommendations. It may be noted also that, in the Parliament in which the Act was passed, the Duke of York was acting as Commissioner for the King. Although it failed in its main object, the Act of 1681 was of value in respect that it expressly affirmed the principle that the Court of Admiralty had a jurisdiction independent of that of the Court of Session in the first instance, and that maritime causes were entitled to special priority on appeal to the Court of Session. This Act continued to regulate the relations of the two Courts until the abolition of the Court of Admiralty by the Court of Session Act, 1830.¹⁶

In criminal causes the same conflict of jurisdiction arose as in the case of civil causes. From earliest times the jurisdiction of the Court of Justiciary had been regarded as cumulative with that of the Court of Admiralty. By the Act of 1681, however, the privative jurisdiction of the Admiralty Court in criminal maritime causes in the first instance was expressly affirmed, but, as in the case of civil causes, no attempt was made to define their nature. Hume is of the opinion that the true test of a criminal maritime cause is not the *locus* of the offence, but the nature of the offence itself as one against the laws of navigation or of seafaring.¹⁷ By the Act 1828 (9 Geo. IV. c. 29), section 16, the jurisdiction of the Court of Justiciary was declared to be cumulative with

¹⁵ Register of Privy Council, 1678-1680, vol. vi., p. 442.

¹⁶ 1 Will. IV. c. 69, secs. 21-29.

¹⁷ Hume on Crimes, ii., 35.

that of the Court of Admiralty in all crimes and offences whatsoever which might competently be tried in the Court of Admiralty. The Court of Session Act, 1830, made no provision for the exercise of the Admiralty jurisdiction by the Court of Justiciary, and accordingly the jurisdiction of that Court is now entirely at common law. In the Sheriff Court the Admiralty criminal jurisdiction has been expressly preserved by the Court of Session Act, 1830, which provided that the Sheriff Courts should hold and exercise an original criminal jurisdiction of the same nature as that formerly exercised by the Court of Admiralty.¹⁸ Occasions, however, for exercising an Admiralty jurisdiction in crime are infrequent, and in crime the Admiralty jurisdiction is in practice treated as merged in the common law jurisdiction.

The prize jurisdiction of the Scottish Court of Admiralty differed from that of the English Court in respect that it was inherent in the Admiral, and did not require, as it did in England, the issue of a special warrant by the Crown to enable it to be exercised.¹⁹ By the Court of Session Act, 1825,²⁰ it was transferred to the English Court of Admiralty, and is now exercised by the Admiralty Division of the English High Court of Justice.²¹

II.

INFERIOR ADMIRALTY COURTS.

The Judge Admiral had the power of granting commissions as Admirals Depute to local judges in the seaport towns. Such commissions were frequently granted to the Sheriffs-Substitute of the counties in which the ports were situated, and provided a means by which summary orders in matters within the Admiralty jurisdiction might be obtained without the delay of applying to the Admiralty Court. The granting

¹⁸ 1 Will. IV. c. 69, sec. 22.

¹⁹ Bell, *Comm.* i., 497.

²⁰ 6 Geo. IV. c. 120, sec. 57.

²¹ Judicature Act, 1873 (36 & 37 Vict. c. 66), sec. 16.

of such commissions, of course, ceased on the abolition of the Admiralty Court.

It was also the practice of the Crown to grant inferior rights of an Admiralty nature both to individuals and to corporations to which judicial functions were attached which were independent of the jurisdiction of the Court of Admiralty. The most important of these, historically, were the jurisdictions of the burghs of Edinburgh and of Glasgow, on the Firths of Forth and Clyde respectively, exercised through their officers, known as water bailies. Such jurisdictions were not struck at by the Act of 1681.²² Appeal lay to the Court of Admiralty, and the Court of Session Act, 1830, provided that such inferior Admiralty jurisdictions should continue, subject to review in the Courts of Session and Justiciary.²³ With the exception of that of the magistrates of Glasgow in the Firth of Clyde,²⁴ these jurisdictions are now entirely in abeyance.

III.

ADMIRALTY JURISDICTION AS NOW EXERCISED.

With the exception of the criminal jurisdiction of the Sheriff Courts, which is in practice now treated as merged in their common law jurisdiction and of the criminal jurisdiction of the river bailie of the Clyde,²⁵ the Admiralty jurisdiction as now exercised is entirely civil. The Court of Session Act, 1830, which abolished the Court of Admiralty, conferred an original civil jurisdiction on the Court of Session and the Sheriff Courts of the same nature as that formerly exercised by the Court of Admiralty,¹ but made no provision for the separate administration of the two jurisdictions,¹ as was done in England. For this reason the Admiralty jurisdiction is

²² *Magistrates of Edinburgh v. Officers of State*, 1831, 10 S. 25.

²³ 1 Will. IV. c. 69, sec. 29.

²⁴ See *infra*, p. 16.

²⁵ See *infra*, p. 16.

¹ 1 Will. IV. c. 69, secs. 21, 22.

now exercised in Scotland cumulatively and concurrently with the common law jurisdiction by the same judges and in the same Courts.² The two jurisdictions, nevertheless, remain distinct, both in their nature and in the law which requires to be applied under them. The Admiralty jurisdiction falls to be exercised in the following cases:—

- (a) where a maritime cause requires to be determined;
- (b) where proceedings of any kind are taken against a ship or goods aboard a ship, whether the cause be maritime or non-maritime; and
- (c) where jurisdiction is expressly assigned to a Court of Admiralty jurisdiction.

In maritime causes the Court of Session and the Sheriff Courts not only exercise their Admiralty jurisdiction, but are bound to administer the maritime law according to the same rules and principles as formerly guided the Court of Admiralty and the Court of Session itself as a Court of review of the decisions of the Court of Admiralty.³ Unfortunately, the Act of 1681 entirely failed to define the nature of a maritime cause, and the only definitions which can be regarded as authoritative are those of the institutional writers, which are in very general terms.⁴ These definitions may be said to cover the following claims:—Claims concerning the possession or co-ownership of ships, bottomry and respondentia, damage by collision, affreightment, salvage, towage, necessities, wages, and master's disbursements. Since the abolition of the Admiralty Court, statutory provision has been made for the enforcement of mortgages of ships or shares therein, for the forfeiture of ships, for the removal of shipmasters, and for the enforcement of penalties for hoisting illegal colours or failing to hoist proper national colours, and these proceedings have in England been expressly assigned to the Admiralty jurisdiction. For this reason they

² See *infra*, p. 18.

³ *Boettcher v. Carron Co.*, 1861, 23 D. 322, Lord Justice-Clérk, at p. 330.

⁴ See *infra*, p. 2.

may reasonably be regarded as maritime causes also in Scotland, and as such subject to the Admiralty jurisdiction. Proceedings for the limitation of liability of shipowners are also statutory and subsequent in date to the abolition of the Admiralty Court, and, since in Scotland they are heard on petitions which are subsidiary to maritime causes, they may also be properly regarded as maritime causes. Claims arising from the contract of marine insurance are in a special position, since, although they fall within the definitions of the institutional writers, they are not now generally regarded as maritime, and in England are determined in the common law Courts according to common law principles. Since the majority of decisions on this branch of law are English, such claims may be regarded as no longer proper maritime causes.

The Admiralty jurisdiction is also exercised in all cases where proceedings are taken against a ship or against cargo aboard a ship, whether the cause be properly maritime or not. The Admiral's jurisdiction was essentially a jurisdiction over ships, the exercise of which was necessary for the proper discharge of his duties of defending the realm, preserving the King's peace at sea, and collecting the customs and other maritime revenues. Proceedings against a ship, therefore, by withdrawing the vessel from her employment, might closely concern the privileges of the Admiral, and for this reason the concurrence of the Judge Admiral was necessary in all such proceedings issuing from the common law Courts, and in such circumstances it was the concurrence of the Judge Admiral, and not the process of the Court, which formed the warrant for the arrestment of a ship.⁵ The Court now, of course, proceeds entirely in virtue of its own jurisdiction, but proceedings against ships or goods aboard them are still of a special character peculiar to the Admiralty jurisdiction of the Court.⁶

In certain cases jurisdiction has been expressly assigned

⁵ *Mackenzie v. Campbell*, 1829, 7 S. 899. Bank Instit., 4, 12, 9.

⁶ See *infra*, chap. III.

to Courts of Admiralty jurisdiction. Thus, claims for work done in the stowing and discharge of cargo or the trimming of coal in ships, none of whose owners reside in the United Kingdom, may be enforced in all Courts having jurisdiction in Admiralty as if the claims were claims for necessities supplied to a ship.⁷ Similarly, proceedings for the condemnation or forfeiture of ships under the Foreign Enlistments Act, 1870,⁸ are in Scotland expressly assigned to the Admiralty jurisdiction of the Court of Session. By the Merchant Shipping Act, 1894,⁹ rights of set-off or counter claim may be determined in proceedings in a Court of Admiralty jurisdiction which concern the claim of a shipmaster in respect of wages or disbursements.

⁷ Merchant Shipping (Stevedores and Trimmers) Act, 1911 (1 & 2 Geo. V. c. 41).

⁸ 33 & 34 Vict. c. 90, secs. 19, 30.

⁹ 57 & 58 Vict. c. 60, sec. 167 (3).

PART I.

PRACTICE OF GENERAL APPLICATION.

CHAPTER I.

JURISDICTION.

Origin of the Admiralty Jurisdiction.—The Admiralty Jurisdiction of the Scottish Courts is derived from that of the old Scottish Court of Admiralty. The date at which that Court was established is uncertain, but its jurisdiction was first clearly defined and confirmed by the Act of 1681 “cerning the jurisdiction of the Admiral Court.”¹ At an early date its criminal jurisdiction fell into abeyance and is now obsolete. Its civil jurisdiction continued in force for a number of centuries, but by the Court of Session Act, 1830,² the Court itself was entirely abolished and its civil jurisdiction transferred to the Court of Session and the Sheriff Courts, by whom it is now exercised.

Status of the Court of Admiralty.—The Act of 1681 expressly declared that the Court of Admiralty was a “sovereigne judicature.” It has, however, been pointed out by Sir George Mackenzie, Lord Advocate at that date, and therefore responsible for the Act, that the use of this expression does not necessarily imply that the Court was an independent tribunal, but merely that it had power to review its own decrees and those of its Admirals-depute.³ Its independence existed merely “in the first instance,” and in certain circumstances appeal lay from it to the Court of Session by means of “suspensions or stops.”⁴ The latter Court, therefore, retained a general appellate jurisdiction. It was a general principle of Scots law that a definite maritime territory lay within the realm as distinguished from the “vast ocean”

¹ 1681, Car. II. c. 82.

² 1 Will. IV. c. 69, secs. 21-29.

³ Mackenzie's Observations on the Acts of Parliament, p. 334.

⁴ Act 1681, Car. II. c. 82.

which was "common to all mankind."⁵ Within the maritime territory, therefore, the common law was valid and the common law jurisdiction might be exercised over ships even in the first instance provided that the concurrence of the Judge Admiral was obtained. In the maritime territory, therefore, the two jurisdictions were concurrent. In this respect Scots law differs materially from that of England, where the realm and the authority of the common law terminate alike at low-water mark, except in so far as the sea is within the body of a county, and no distinction is drawn between territorial waters and the high seas. Thus it has been observed that "the only distinction known to the law of England as regards the sea is between such part of the sea as is within the body of a county and such as is not. In the first, there is jurisdiction over the foreigner on a foreign ship; in the second, there is not. Such a thing as sea which shall be at one and the same time high sea and also part of the territory of the realm is unknown to the present law, and never had an existence except in the old and senseless theory of universal dominion over the narrow seas."⁶

Nature of a Maritime Cause.—The Act of 1681 entirely failed to define the nature of a maritime cause. They have since been defined in general terms by the institutional writers. Bell states that they are those "relative to charter parties, freights, salvages, wrecks, collision of ships, bottomry, and policies of sea insurance without any regard to the place of contract as executed on sea or land."⁷ Erskine states that they are those involving "questions of charter parties, freights, salvages, wrecks, bottomries, policies of insurance, and in general all contracts concerning the lading or unlading of ships or any other matter to be performed within the verge of the Admiral's jurisdiction; and all actions for the delivery of goods sent on shipboard or for recovering their value or where the subject of the suit consists of goods transported by sea from one port to another."⁸ Bankton states that "all contracts entered into upon the sea or within flood-mark are within the Admiral's civil jurisdiction. From the nature of the contracts likewise all actions on policies of insurance or upon charter party between merchant and

⁵ Stair, Inst., 2, 1, 5.

⁶ *Reg. v. Keyn*, 1876, 2 Ex.D. 63, Cockburn, C.J., at 229.

⁷ Comm. i., 546.

⁸ Inst., 1, 3, 33.

“mariner or against shipmasters for freight wages and damages through breach of such charter party are proper to that Court.”⁹ Since these definitions were made the Admiralty jurisdiction has been considerably extended both by statute and in practice. The particular claims which may now be regarded as maritime causes are considered in detail elsewhere.¹⁰ Such claims are, however, only maritime in so far as they involve proceedings against a ship, and may all be brought in common law form where no such proceedings are taken. Thus actions arising from affreightment or marine insurance are generally brought as personal claims in common law form.

Law to be Applied in a Maritime Cause.—In a maritime cause the Scottish Courts exercise their Admiralty jurisdiction and in general apply Admiralty law, and it has been pointed out that since 1830, when the Court of Admiralty was abolished, the Court of Session “has both an Admiralty and a common law jurisdiction, and is bound to administer and apply maritime law in maritime causes.”¹¹ The maritime law thus applied is the general maritime law which is common to all maritime nations, and is therefore the same as that applied in England.¹² Thus it has been observed that “it is impossible to say that there is any peculiarity in our jurisprudence in this department which distinguishes it from the maritime law of other nations, or in particular from the Admiralty law of England. In many, if not in most, departments the law of Scotland and the law of England are derived from different sources; and thus, starting with different principles, it is not surprising that they should in some departments still more widely diverge in the practice of centuries. But the Admiralty law of the two countries is derived from the same source, namely, the ancient customs of the commercial nations of Europe, which have grown up into a system with the knowledge and assent of both England and Scotland as members of the commercial community of nations, and which, within certain limits and with certain exceptions, have all the force of an international code.”¹³ In determining the principles to be followed, the decisions of foreign tribunals which in Scotland have the greatest weight are those

⁹ Inst., 4, 12, 3.

¹⁰ Part II.

¹¹ *Boettcher v. Carron Co.*, 1861, 23 D. 322, L.J.C., at 332.

¹² *Currie v. M'Knight*, 1896, 24 R. (H.L.) 1.

¹³ *Boettcher v. Carron Co.*, 1861, 23 D. 322, L.J.C., at 330.

of the Admiralty Division of the English High Court.¹⁴ The maritime law of Scotland is therefore British and not Scottish law, and it has been pointed out that it would be surprising if the rule were otherwise, and "if at the present day ships "enjoying the privileges and subject to the conditions of "British registry should sail from the ports of the United "Kingdom under the same flag and subject to the same statutory regulations in all respects and yet that, in case of collision, the legal rights of the parties might vary according "as the case may be tried in one British Admiralty Court or "another."¹⁵

This general principle is, however, subject to certain qualifications. Thus the maritime law is not a complete system on the questions with which it deals, and frequently requires to be supplemented by the common law. In such cases, therefore, it is necessary to blend the two codes, and it has been pointed out that in England—as is, of course, equally the case in Scotland—"the judge of the Court of Admiralty does not cease to "be a judge of the High Court because he is a judge of the "Court of Admiralty, and although as judge of the Court of "Admiralty he may have no jurisdiction . . . as judge "of the High Court he has, and whether or not he can blend "the two jurisdictions is a matter of discretion subject to "review by this Court."¹⁶ It has been observed, further, that "the law which is administered in the Admiralty Court of "England is the English maritime law. It is not the ordinary "municipal law of the country, but it is the law which the "English Court of Admiralty, either by Act of Parliament or "by reiterated decisions and traditions and principles, has "adopted as the English maritime law."¹⁷ In cases where it is necessary to supplement the maritime by the common law the Scottish Courts are, of course, under no obligation to adopt English decisions, and, in any event, in all cases are no less free "to examine the merits of an English authority "than an English Court is to estimate the value "of a Scottish decision and to accept or reject "it according to its own view of the law maritime." The decisions, however, of the House of Lords, as the ultimate *forum* in all maritime causes arising in the United Kingdom, are in a special position, and are of equal authority

¹⁴ Bell, Comm. i., 500.

¹⁵ *Boettcher v. Carron Co.*, 1861, 23 D. 322, L.J.C., at 331.

¹⁶ *The "Cheapside"*, 1904, P. (C.A.) 339, Collins, M.R., at 343.

¹⁷ *The "Gaetano and Maria"*, 1882, 7 P.D. (C.A.) 137, Butt, L.J., at 143.

in all the Admiralty Courts of the Kingdom.¹⁸ It may be observed, further, that the Admiralty jurisdiction in the two countries is not precisely co-extensive, and that the principle of uniformity only applies in causes which exclusively belong to the Admiralty jurisdiction in both countries. Thus in England questions arising in regard to affreightment, except in certain special circumstances, or to policies of marine insurance, are outwith the Admiralty jurisdiction, and are determined entirely on common law principles. In such causes, therefore, English decisions are not necessarily precedents in the Scottish Courts.¹⁹ In certain events, moreover, the Court may require to apply foreign municipal law. It has been pointed out that Courts of Admiralty jurisdiction constantly require to apply such law in claims for possession or wages and in those arising from bottomry or mortgage.²⁰ Liability both on contract and on delict frequently requires to be determined according to foreign municipal law.

Extent of the Maritime Territory of Scotland.—On its landward side the maritime territory of the realm included “all ports, harbours, or creiks” of the sea and “fresh waters “or navigable rivers below the first bridges or within the flood-marks so far as the same does or can at any time extend.”²¹ To sea its limits were indefinite. The measure applied in Scots law to the limits of the realm was that of the range of vision, and, accordingly, “where the sea is enclosed in bays, creeks, “or otherwise is capable of any bounds or meiths as within “the points of such lands or within the view of such shores “there it may become proper, but with the reservation of passage for commerce as in the land.”²² In practice this was formerly interpreted as a distance of 14 miles from land, namely, the distance at which the coast-line was visible from the main-top of a ship on a clear day, commonly known as a “land-kenning.” This distance was specified in the draft Treaty of Union with England of 1604 as the limit of Scottish exclusive fishing rights, and it was also adopted in certain other instances.²³ The doctrine, however, of the range of vision

¹⁸ *Currie v. M'Knight*, 1896, 24 R. (H.L.) 1, Lord Watson, at 4.

¹⁹ *Sailing Ship “Blairmore” Co., Ltd. v. Macredie*, 1898, 25 R. (H.L.) 59, Lord Watson, at 63.

²⁰ *The “Annette”*: *The “Dora”*, 1919, P. 105, Hill, J., at 114.

²¹ Act 1681, Car. II. c. 82.

²² Stair, Inst., 2, 1, 5.

²³ Fulton's Sovereignty of the Sea.

as the boundary of the realm is now obsolete, and a distance of 3 nautical miles from low-water mark is regarded as territorial water for all purposes.²⁴ Over a wider area, however, as yet undefined, the Court will be prepared to exercise jurisdiction in so far as clearly authorised by the Legislature.²⁵ Within these limits it follows from the fact that the territorial waters lie within the realm that the Crown possesses full proprietary rights both in the sea and in the *solum* beneath it, subject only to certain public uses.¹ Thus, the opinion has been expressed that the Crown may make a valid grant to a subject on a barony title of the minerals in the *solum* anywhere within those limits, provided that the public rights are not in any way infringed.² It should, however, be noted that the nature and extent of the rights of a State in its territorial waters are primarily a question of international and not of municipal law, and that municipal law must be applied in conformity with international practice, and in a recent case it was observed in the Privy Council that "they (the Court) desire, however, " to point out that the 3-mile limit is something very different " from the 'narrow seas' limit discussed by the old authorities, such as Selden and Hale, a principle which may safely " be said to be now obsolete. The doctrine of the zone comprised in the former limit owes its origin to comparatively " modern authorities on public international law. Its meaning " is still in controversy. The questions raised thereby affect " not only the Empire generally but also the rights of foreign " nations as against the Crown, and of the subjects of the Crown " as against other nations in foreign territorial waters. Until " the Powers have adequately discussed and agreed on the " meaning of the doctrine at a conference, it is not desirable " that any municipal tribunal should pronounce on it. It is " not improbable that in connection with the subject of trawling " the topic may be examined at such a conference. Until then " the conflict of judicial opinion which arose in *Reg. v. Keyn* " is not likely to be satisfactorily settled, nor is a conclusion " likely to be reached on the question whether the shore below " low-water mark to within 3 miles of the coast forms part " of the territory of the Crown or is merely subject to special

²⁴ *Lord Advocate v. Clyde Navigation Trustees*, 1891, 19 R. 174; *Gammell v. Commissioners of Woods and Forests*, 1859, 3 Macq. 419.

²⁵ *Mortensen v. Peters*, 1906, 8 F. (J.) 93, Lord President, at 101.

¹ *Cunninghame v. Assessor for Ayr*, 1895, 22 R. 596.

² *Lord Advocate v. Wemyss*, 1899, 2 F. (H.L.) 1, Lord Watson, at 8.

"powers necessary for protection and police purposes."³ In view, therefore, of these observations, the extent of the maritime territory cannot be precisely defined. The Territorial Waters Jurisdiction Act, 1878,⁴ declares in general terms that "the rightful jurisdiction of Her Majesty, her heirs, and successors extends, and has always extended, over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such distance as is necessary for the defence and safety of such dominions,"⁵ and that "the territorial waters of Her Majesty's dominions in reference to the sea means such part of the sea adjacent to the coast of the United Kingdom or the coast of such other part of Her Majesty's dominions as is deemed by international law to be within the territorial sovereignty of Her Majesty."^{6a} Although the limits laid down by that Act apply expressly only to the criminal jurisdiction of the Crown, they are in practice treated as applicable also to its civil jurisdiction.

Nature of Jurisdiction in Admiralty.—The Admiralty jurisdiction is essentially a jurisdiction over ships, and its primary importance is that it recognises and provides procedure for enforcing rights in ships of a special character. Although the common law jurisdiction also may be exercised over ships, such rights as those of maritime lien are unknown to it, and it provides no appropriate procedure for enforcing them. Where, therefore, it is desired to enforce such rights it is necessary to proceed under the Admiralty jurisdiction of the Court. The Admiralty jurisdiction arises *ratione rei sitæ* by reason of the *res* being situated within the maritime territory, and it is founded by the arrestment of the *res*, which for obvious reasons requires to take place within a safe harbour. The Act of 1681 declared that the Admiral of Scotland had "the sole privilege and jurisdiction in all maritime and sea-faring causes forraigne and domestick, whether civil or criminal, whatever within this realm and over all persons as they are concerned in the same,"⁶ and it has been observed that "the act of entering a port in Scotland subjected the ship, the shipmaster, and even the owner *quoad hoc* to

³ *Attorney-General for British Columbia v. Attorney-General for Canada*, 1914 A.C. 154, Lord Haldane, L.C., at 174.

⁴ 41 & 42 Vict. c. 73.

⁵ Preamble.

^{6a} Sec. 7.

⁶ 1681, Car. II. c. 82.

"the jurisdiction of the Scottish Courts."⁷ In the Scottish Court of Admiralty this jurisdiction was exercised by means of a maritime action in special form. Jurisdiction was exercised by the issue of a blank precept in virtue of which the vessel might be instantly arrested without *induciae*. It was unnecessary to call the owners, whose names might be unknown, and the precept might be directed against the master alone. If the owners failed to enter appearance decree might proceed in their absence and the vessel be judicially sold in extinction *pro tanto* of the debt in respect of which she had been arrested. If the owners entered appearance and found caution *de judicio sisti et judicatum solvi*, personal jurisdiction was founded against them also, since they were deemed to have voluntarily submitted to the jurisdiction.⁸

Jurisdiction founded in this manner was especially appropriate to a Court whose jurisdiction was "most conversant about strangers."⁹ It appears to be essentially similar in nature to jurisdiction founded on arrestment *ad fundandam jurisdictionem*, and to have been used in the Court of Admiralty before jurisdiction by arrestment *ad fundandam jurisdictionem* is first reported as being used in the Court of Session.¹⁰ Regarding jurisdiction founded on arrestment *ad fundandam jurisdictionem* the opinion has been expressed that it also is "a development of the generally recognised principle that jurisdiction arises *ratione rei sitae*,"¹¹ and it has been pointed out that "it is plainly in opposition to the general doctrine both of the Roman law and modern jurisprudence, both of which admit the maxim *actor sequitur forum rei*."¹² It may be noted that jurisdiction in an English Admiralty action *in rem* appears to be of a similar nature.¹³

Method of Exercise of Jurisdiction.—The form of action used in the Court of Admiralty is, of course, now obsolete. In modern practice the Admiralty jurisdiction is exercised by arrestment by which jurisdiction may be founded either against property or against persons.

⁷ Smith's Maritime Practice, p. 13.

⁸ *Ibid.*

⁹ Stair, Inst., 4, 47, 23.

¹⁰ *Young v. Arnold*, 1683, M. 4833.

¹¹ *La Société du Gaz de Paris v. Les Armateurs Français*, 1925 S.C. 332, Lord Hunter, at 355.

¹² *Cameron v. Chapman*, 1838, 16 S. 907, at 918.

¹³ Marsden's Select Pleas of the Admiralty, vol. i., p. lxxi., cf. *The "Dupleix"*, 1912, P. 8, Evans, J., at 13.

(1) **By Arrestment in rem.**—Where it is desired to found jurisdiction against the ship herself procedure is by petition in the Bill Chamber, in virtue of which a warrant of arrestment *in rem* may be obtained. The circumstances in which this procedure may be used are considered elsewhere.¹⁴ Although it has never been expressly so held, it appears to be an equally competent method of founding jurisdiction against cargo.

(2) **By Arrestment ad Fundandam Jurisdictionem.**—Where it is desired to found personal jurisdiction against the owner of a ship arrestment *ad fundandam jurisdictionem* in its modern form is used, the principles of which are substantially the same in the case of a ship as in that of other corporeal moveables. From the nature of the case, however, the arrestment of a ship *ad fundandam jurisdictionem* presents certain special features.

(a) **Persons against whom Jurisdiction is Founded.**—The arrestment founds jurisdiction only against the true owner of the vessel, who is not necessarily the registered owner, the certificate of registry being merely *prima facie* evidence of ownership.¹⁵ It is ineffective against a mere possessor of the vessel, even though he is legally in possession. Thus it fails to found jurisdiction against a mortgagee in possession in any event in a case where the validity of the mortgage is challenged,¹⁶ or against a person who has already transferred the property in the ship, even although he has not yet had an opportunity of giving delivery.¹⁷ It is also ineffective in any case where the conclusions of the action are themselves destructive of the jurisdiction which the arrestment seeks to found, as where the action seeks to establish that the defenders are not the true owners of the ship.¹⁸ Where used against one co-owner of a ship by name “and the other owners” unnamed, it is effective to found jurisdiction against them all,¹⁹ but where it is used against some only of the co-owners it founds jurisdiction against them alone, notwithstanding that the property in the ship is held in common with the other owners.²⁰ Where it

¹⁴ See *infra*, p. 58.

¹⁵ *Bell v. Gow*, 1862, 1 M. 183.

¹⁶ *Jones v. Samuel*, 1862, 24 D. 319.

¹⁷ *Schultz v. Robinson & Niven*, 1862, 24 D. 120.

¹⁸ *Grant v. Grant*, 1867, 6 M. 155.

¹⁹ *Leaburn v. Basset*, 1865, 1 S.L.R. 88.

²⁰ *Gibson v. Smith*, 1849, 11 D. 1024.

is used against the master as representing the owners it founds jurisdiction against them all, in any event if they are unknown and cannot be identified.²¹ Arrestment of freight in the hands of a sub-freighter against whom the owner has no direct right of action for the freight fails to found jurisdiction against the owners.²² The arrestment may be used in petitory actions; in actions *ad factum præstandum*²³; and in mixed petitory and declaratory actions, in any event where the declaratory conclusions are merely the *medium decidendi* of the personal claim,²⁴ but not in actions of *status* or pure declarator.²⁵

(b) **Effect of Arrestment.**—Like the arrestment of other moveables, the arrestment now places no *nexus* whatever on the vessel, but merely attests “the fact that the ship is at the “time within the jurisdiction, and that notice has been given “that it is the intention of the person using the diligence to “raise an action founding on the jurisdiction, which results “from the property being within the country.”¹ It does not become inoperative by reason of the vessel leaving the jurisdiction before the action for the purpose of which it has been used is raised, provided always that reasonable diligence is used in following it up. Thus it has been observed that since it merely attests the presence of the ship within the jurisdiction, “it is difficult to see what hardship should “result from the continuance of the effect of such a “certificate or notice in the case of maritime subjects. No “disability is imposed on the owner of the ship, and the master “is put under no obligation to make the ship forthcoming. “Within reasonable limits, therefore, we may leave it to the “person using the diligence to serve his summons, it being “his interest to use dispatch.” Accordingly, in a case where a vessel had left the jurisdiction within three weeks of the arrestments being used, and the action was not raised until two months later, it was held that there had been no unreasonable delay.² What amounts to unreasonable delay must be in all cases a question of circumstances. In cases where the

²¹ *Morison & Milne v. Massa*, 1866, 5 M. 130.

²² *Mitchell v. Burn*, 1874, 1 R. 900.

²³ *Powell v. Mackenzie & Co.*, 1900, 8 S.L.T. 182.

²⁴ *Lindsay v. North-Western Railway Co.*, 1855, 18 D. 62.

²⁵ *Williams v. Royal College of Veterinary Surgeons*, 1897, 5 S.L.T. 208; *Union Electric Co., Ltd. v. Holman & Co.*, 1913 S.C. 954.

¹ *Craig v. Brunsgaard Kjøsterud & Co.*, 1896, 23 R. 500, Lord MacLaren, at 503.

² *Craig v. Brunsgaard Kjøsterud & Co.*, *supra*, Lord MacLaren, at 503.

vessel has already sailed, and the defender possesses no other property within the jurisdiction, it may be expedient to delay raising the action until the vessel, or another vessel belonging to the same owner, returns within the jurisdiction and it is possible to arrest her in security. In such a case it is probable that it would be held that no unreasonable delay had occurred. In practice, however, the risk of the vessel leaving the jurisdiction before the action is raised is generally obviated by executing arrestments *ad fundandam jurisdictionem* and in security simultaneously. In England the rule followed is that once jurisdiction over a claim has arisen it continues indefinitely whether the vessel leaves the jurisdiction or not, and an action founded on arrestment of the ship may be raised at any subsequent date, however distant.³ The arrestment founds jurisdiction to the full extent of the defender's personal liability. Since, however, in the majority of cases, the ship is the only property which the defender possesses within the jurisdiction, and the only property against which diligence in security or in execution can be used, the remedy of the pursuer is in effect generally limited to her value. The arrestment is only effective in the particular action in respect of which it is used, and, accordingly, if the pursuer sues in the capacity of shipowner, and subsequently amends the summons by introducing the names of other persons as co-owners, the arrestment is inept, since that is in substance a different action.⁴ It has been held that the arrestment is sufficient to render the Court of Session a Court of "competent jurisdiction" within the meaning of the Tyne Improvement Act, 1890,⁵ and, accordingly, the Court is entitled to exercise jurisdiction in an action raised under that Act for the purpose of which a vessel has been arrested *ad fundandam jurisdictionem* in Scotland.⁶

(c) Procedure.—In the Court of Session procedure is by bill for letters of arrestment, which are obtained in the Bill Chamber, and are signeted. The signet letters proceeding on a *flat* from the Clerk of the Bills form the warrant for the arrestment. In the Sheriff Court procedure is by initial writ on which letters of arrestment are delivered. Execution is in ordinary form.

³ *The "Pieve Superieure,"* 1874, 5 P.C. 482.

⁴ *Andersen v. Harboe*, 1871, 10 M. 217.

⁵ 53 Vict. c. xxviii., sec. 42.

⁶ *Tyne Improvement Commissioners v. Aktieselskabet Aalborg Dampskibsselskab*, 1905, 12 S.L.T. 693.

(d) **Form of Warrant.**—It has been held that a direction in the letters that the vessel shall remain under arrestment “until sufficient caution shall be found acted in the books of Court *ad fundandam jurisdictionem*,” and a declaration in the execution that the vessel shall remain under arrestment *jurisdictionis fundandæ causa* until caution be found “that the same shall be made forthcoming” to the pursuer are redundant and unnecessary forms, but that they do not invalidate the arrestment, and that the discrepancy between the execution and the letters being in words which are not essential do not invalidate the execution as being disconform to the letters. It was observed that arrestment *ad fundandam jurisdictionem* is not properly diligence at all, and that, therefore, the maxim that procedure should be dealt with *strictissimi juris* does not apply.⁷ In cases of urgency, where there is reason to believe that the vessel will have sailed before letters can be obtained in the Bill Chamber, it may be more expeditious to proceed in the Sheriff Court of the sheriffdom within which the vessel is situated. Since the arrestment imposes no *nevus*, the words “the same being always in a safe harbour,” which appear in a warrant of arrestment in security, may be omitted in letters of arrestment *ad fundandam jurisdictionem*, and the words “whenever and in whose hands soever the same may be or can be found” may be substituted.⁸ Similar principles appear to apply to the arrestment of cargo *ad fundandam jurisdictionem*.

Jurisdiction at Common Law.—Since the Admiralty and common law jurisdictions are cumulative and are exercised concurrently, jurisdiction may be exercised in a maritime cause on any of the grounds known at common law.

(a) **Over Seamen.**—Seamen are generally persons with no fixed place of residence, and are at common law in the position of itinerants. They are, therefore, subject to the jurisdiction by reason of residence for however short a period within the jurisdiction.⁹ This ground of jurisdiction is expressly recognised by the Merchant Shipping Act, 1894, in the case of all persons subject to its provisions. The Act provides that “in Scotland all . . . actions or proceedings under this Act . . . may be brought in a summary form before the Sheriff of the county or before any two justices of the peace of the

⁷ *Fraser-Johnston Engineering Co., Ltd. v. Jeffs*, 1920 S.C. 222, Lord Mackenzie, at 230.

⁸ *Jur. Styles* iii., 306.

⁹ *Linn v. Casadinos*, 1881, 8 R. 849.

"county or burgh where the cause of such . . . action arises or where the . . . defender may be for the time."¹⁰ It has been held competent to interdict the owner of a foreign ship employed in removing stones from Scottish territory.¹¹

(b) **Over Foreign Shareholders in a Ship.**—Registration of a ship at a Scottish port in itself forms no ground of jurisdiction either over the ship herself or her owners. Accordingly, it is no ground of jurisdiction over a shareholder resident abroad.¹² Ownership, however, of British ships or shares therein by persons other than "natural-born British subjects" is restricted.¹³

(c) **Over Classification Societies.**—Lloyd's Association, which is a voluntary association of shipowners and others formed for the purpose of the classification and registration of British ships, but carries on no trade or business, is subject to the jurisdiction of the Scottish Courts in virtue of possessing branch offices in Scotland.¹⁴ Other classification societies, of which the principal are the British Corporation, whose head office is in Glasgow, the Bureau Veritas of France, and the Germanischer Lloyd's of Germany, both of whom possess branch offices in Scotland, appear to be subject to the jurisdiction on similar grounds. Since, however, classification societies are not conducted for the purpose of earning profits, they have no privity of contract either with the persons whose vessels are classified and registered by them or with the outside public. The opinion has, however, been expressed that a shipowner may have a right of action to recover registration fees if the society had failed to place his vessel in the class to which she was entitled.¹⁵ On similar grounds it has been held in England that classification societies have no privity of contract with third parties dealing with shipowners whose vessels have been classified and registered, and, accordingly, that no action lies against such a society at the instance of a purchaser of a ship for a misstatement in the classification certificate in any event where no fraud is alleged.¹⁶

¹⁰ 57 & 58 Vict. c. 60, sec. 703; cf. sec. 685.

¹¹ *Campbell v. Arnett*, 1893, 1 S.L.T. 159.

¹² *Anderson v. Sillars*, 1894, 22 R. 105.

¹³ Merchant Shipping Act, 1894, *supra*, sec. 1.

¹⁴ *Henderson v. Lloyd's Association*, 1879, 6 R. 835.

¹⁵ *Henderson v. Lloyd's Association*, *supra*.

¹⁶ *Thodon v. Tindall*, 1891, 60 L.J. Q.B. 526.

Jurisdiction of the Court of Session.—The Admiralty jurisdiction of the Court of Session is founded on the Court of Session Act, 1830,¹⁷ which provides that “the Court of Session shall hold and exercise original jurisdiction in all maritime causes and proceedings, of the same nature and extent in all respects as that held and exercised in regard to such causes by the High Court of Admiralty before the passing of this Act.” The jurisdiction has now been considerably extended both by statute and in practice. The causes which may now be regarded as maritime are considered in detail elsewhere.¹⁸

Jurisdiction of the Sheriff Courts.—The Admiralty jurisdiction of the Sheriff Courts, which was created by the Court of Session Act, 1830,¹⁹ has also been extended by statute and in practice. It is now regulated by the Sheriff Courts Act, 1907, and the Merchant Shipping Act, 1894.

(a) **Under the Sheriff Courts Act, 1907.**—The Sheriff Courts Act, 1907,²⁰ provides—

“Sec. 4. The jurisdiction of the Sheriffs, within their respective sheriffdoms, shall extend to and include all navigable rivers, ports, harbours, creeks, shores, and anchoring grounds in or adjoining such sheriffdoms. And the powers and jurisdictions formerly competent to the High Court of Admiralty in Scotland in all maritime causes and proceedings, civil and criminal, including such as may apply to persons furth of Scotland, shall be competent to the Sheriffs, provided the defender shall upon any legal ground of jurisdiction be amenable to the jurisdiction of the Sheriff before whom such cause or proceeding may be raised, and provided also that it shall not be competent to the Sheriff to try any crime committed on the seas which it would not be competent for him to try if the crime had been committed on land: Provided always that where sheriffdoms are separated by a river, firth, or estuary, the Sheriffs on either side shall have concurrent jurisdictions over the intervening space occupied by water.”

“Sec. 6. Any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff . . . (c) where the defender is a person not otherwise subject to the jurisdiction of the Courts of Scotland, and a ship or

¹⁷ 1 Will. IV. c. 69, sec. 21.

¹⁸ Part II.

¹⁹ Sec. 22.

²⁰ 7 Edw. VII. c. 51.

“ vessel of which he is owner or part owner or master, or goods, “ debts, money, or other moveable property belonging to him, “ have been arrested within the jurisdiction.”

Formerly, although letters of arrestment *ad fundandam jurisdictionem* might be issued by the Sheriff as judge ordinary of the locality where the property to be arrested was situated, actions founded on such arrestment being necessarily against foreigners for whom the Court of Session was the *commune forum* were incompetent in the Sheriff Court. This restriction has now been removed.

(b) Under the Merchant Shipping Act, 1894.—The Merchant Shipping Act, 1894,²¹ provides—

“ Sec. 685. (1) Where any district within which “ any Court, justice of the peace, or other magis- “ trate, has jurisdiction either under this Act or at “ common law for any purpose whatever is situate on “ the coast of any sea, or abutting or projecting into any bay, “ channel, lake, river, or other navigable water, every such “ Court, justice, or magistrate shall have jurisdiction over any “ vessel being on, or lying or passing off, that coast, or being “ in or near that bay, channel, lake, river, or navigable water, “ and over all persons on board that vessel or for the time “ being belonging thereto, in the same manner as if the vessel “ or persons were within the limits of the original jurisdiction “ of the Court, justice, or magistrate. (2) The jurisdiction “ under this section shall be in addition to and not in deroga- “ tion of any jurisdiction or power of a Court under the Sum- “ mary Jurisdiction Acts.”

Apart from the provision regarding vessels “ pass- “ ing off” the coasts, this provision is merely declaratory of the original Admiralty jurisdiction of the Sheriff Courts as defined in the Sheriff Court Act. Since, however, both by the common law of Scotland²² and by international practice,²³ foreign vessels are accorded the right of innocent passage through territorial waters, this provision is primarily intended to apply to criminal proceedings.

Jurisdiction of the Justice of the Peace Courts.—The jurisdiction of the Justice of the Peace Courts under the Mer-

²¹ 57 & 58 Vict. c. 60.

²² Stair, Inst., 2, 1, 5.

²³ *Reg. v. Keyn*, 1876, 2 Ex.D. 63, Cockburn, C.J., at 218.

chant Shipping Act is similar.²⁴ Their maritime jurisdiction is, however, limited by the fact that they possess no machinery for proceeding *in rem*.

Jurisdiction of the Court of the River Bailie of the Clyde.
—The jurisdiction of the Burgh Courts as expressed in the Merchant Shipping Act is similar.¹ In Scotland their civil jurisdiction is in abeyance. The Court, however, of the River Bailie of the Clyde is exceptional. This Court appears to be the only survival of the Water Bailie Courts of the maritime burghs by which an extensive maritime jurisdiction was exercised prior to the creation of the Court of Admiralty.² Its jurisdiction, as confirmed by a charter of Charles I., extends “within the said River Clyde where the sea flows and ebbs and “within the whole bounds thereof below the Bridge of Glasgow “to the Clochstane.” Within these limits its jurisdiction is concurrent with that of the Sheriff Courts.³ Owing, however, to the provision by which the jurisdiction of sheriffdoms separated by navigable waters was made concurrent in the intervening waters, much of its importance as a maritime Court has been lost. Its civil jurisdiction, like that of other burgh Courts, is now in abeyance. It has, however, been pointed out that it still subsists and might be resuscitated.⁴ It has been observed that “it is a most anomalous jurisdiction and of “an Admiralty nature.”⁵ It therefore possesses an original jurisdiction *in rem*.

²⁴ Sec. 685.

¹ Sec. 685.

² Welwood's Sea Lawes of Scotland, chap. ii.

³ Bell, Commentaries on Statutes, p. 12.

⁴ Report by the Assessor and Clerk of the River Bailie Court to the Magistrates of Glasgow, 30th March, 1900.

⁵ *Donaldson v. Chapman*, 1828, 7 S. 41.

CHAPTER II.

PROCEDURE IN A MARITIME CAUSE.

General Characteristics of Admiralty Procedure.—The special features which are generally characteristic of Courts of Admiralty jurisdiction are that their procedure is more flexible and more expeditious than the procedure of common law Courts, and that it provides appropriate machinery for proceeding *in rem* against the ship herself which is the subject of a claim. These characteristics have been the subject of repeated judicial comment. Thus Lord Haldane observes that “the popularity of the Court of Admiralty appears to have rested in a considerable measure on its freedom from certain technical rules of procedure which were applied inexorably by the Courts of common law and on its power to proceed *in rem*”;¹ Lord Phillimore observes that “Admiralty jurisdiction originated in the civil law, and never lost all touch with it. Its procedure was malleable and adaptable”;² Dr. Lushington states that “it is a well-known principle confirmed by authority that Courts of Admiralty are to proceed *levato velo*, that is, with the utmost expedition”;³ and Lord Jeffrey observes that “in maritime causes the parties are always supposed to be *in meditatione fugæ*; they have their sails spread, and are, as it were, on the wing, and ever ready to depart.”⁴ Moreover, the Act of 1681 itself, by which the jurisdiction of the Scottish Court of Admiralty was first defined, was expressly declared to be designed for “the more ready and quick dispatch of justice in maritime and seafaring causes.”⁵ A further characteristic is that, so far as not expressly bound by precedent or statute, the Court will proceed on equitable principles. Thus Lord President Inglis observes that the implied equitable contract of recompense “runs through and characterises the whole maritime law of Europe.”⁶ The

¹ *Owners of s.s. "Devonshire" v. Owners of Barge "Leslie,"* 1912 A.C. 634, at 643.

² *Ship "Marlborough Hill" v. Alex. Cowan & Sons, Ltd.,* 1921 A.C. 444, at 457.

³ *The "Peerless,"* 1860, Lush. 30, at 41.

⁴ *Gray v. Sutherland,* 1847, 10 D. 154, at 156.

⁵ 1681, Car. II. c. 82.

⁶ *Anderston Foundry Co. v. Law,* 1869, 7 M. 836, at 843.

extent, however, to which the Court will allow itself to be influenced by purely equitable considerations has never been determined. Lord Stowell observes that "this Court certainly "does not claim the character of a Court of general equity; "but it is bound by its commission and constitution to determine the cases submitted to its cognisance upon equitable "principles and according to the rules of natural justice"; and Dr. Lushington, after reviewing the authorities, concludes that "the result would seem to be that the Court of Admiralty "may in deciding a case be influenced by equitable considerations, but that its power to invoke matters foreign to the "direct issue, though thereby more complete justice might be "done, is not acknowledged."⁸ Although less marked in Scotland owing to the absence of a separate Court of Admiralty, there are, nevertheless, numerous illustrations of the presence of these characteristics in the procedure in a maritime cause.

Procedure in Scotland.—The circumstances in which maritime causes are conducted in Scotland are exceptional. Elsewhere throughout the British Dominions the universal rule is for the Admiralty jurisdiction to be exercised in separate Courts, and according to forms and rules of procedure which are distinct from those of the common law.⁹ In Scotland, however, there are no distinct Courts to which the exercise of the Admiralty jurisdiction is exclusively assigned. Thus when in 1830, by the Court of Session Act, 1830,¹⁰ the Court of Admiralty was abolished, and its civil jurisdiction transferred to the Court of Session and the Sheriff Courts, no provision was made for the separate administration of the Admiralty jurisdiction, and, accordingly, each judge of the common law Courts became at once a judge in Admiralty and at common law, and might exercise the two jurisdictions cumulatively and concurrently. Moreover, the construction placed upon the Act was such that it was generally interpreted as one for the simplification of procedure, the only express provision for the preservation of the Admiralty forms and rules of procedure being that "the finding of caution and the using of arrestment heretofore "observed in the High Court of Admiralty may be enforced in the foresaid Courts respectively."¹¹ Accord-

⁷ *The "Juliana,"* 1822, 2 Dods, 504, at 521.

⁸ *The "Don Francisco,"* 1862, Lush. 468, at 472.

⁹ Cf. Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27).

¹⁰ 1 Will. IV. c. 69, secs. 21-29.

¹¹ Court of Session Act, 1830, *supra*, sec. 23.

ingly, the policy of the Courts whose duty it was to apply the Act was to supersede as far as possible the Admiralty forms of procedure with their own. Thus, with reference to maritime causes in the Court of Session, it was observed by the Lord Justice-Clerk of that date that "there is nothing in the circumstance that this was formerly an Admiralty cause. When brought into this Court it must be dealt with as a Court of Session cause"¹²; and similarly it was observed by the Lord President that "the Admiralty processes have been transferred to this Court, but not all the Admiralty forms of process. Such causes must be conducted according to the forms of this Court."¹³ For these reasons procedure in a maritime cause in the Court of Session has been more closely assimilated to that in a common law action than has been the case in England, where the two jurisdictions are exercised independently and in separate divisions of the High Court, and in Scotland the statutory common law rules of procedure are in the main now applicable also to maritime causes. In the Sheriff Court it was expressly provided from the first that "maritime causes may be heard and determined by the Sheriff according to the same modes and rules which are applicable in the Sheriff Court to causes not maritime."¹⁴ Although this provision was merely permissive, the common law procedure, so far as applicable, appears to have been at once adopted.

(1) **Former Procedure.**—In the Scottish Court of Admiralty a maritime cause was initiated by the issue of a blank precept by the Court proceeding on short copies of citation, *i.e.*, without *induciae*. If the owners of the ship were unknown, as was frequently the case prior to the introduction of registration, or were foreigners, the precept was directed to the master as their representative. On the issue of this precept the vessel might be at once arrested, and the precept might be libelled and a diet of proof fixed at a later date. If the owner failed to enter appearance, as was generally the case when the amount of the debt exceeded the value of his interest in the ship, the proceedings were in no sense deemed to be directed against him, since the Court was, in fact, ignorant of his identity, and he was not before it but against the ship herself, which might be judicially sold in extinction *pro tanto* of the debt. If the owner entered appearance and lodged defences, he was required to find

¹² *Cobb & Mitchell v. St. Patrick Assurance Co.*, 1833, 11 S. 993.

¹³ *Taylor v. Williamson*, 1831, 9 S. 265.

¹⁴ Court of Session Act, 1830, *supra*, sec. 23.

caution *de judicio sisti et judicatum solvi*, i.e., to abide judgment within the jurisdiction and to discharge the debt so far as decreed for. The vessel was thereupon released, and the action became in effect a personal one against the owner, who was deemed by his appearance to have submitted voluntarily to the jurisdiction. The pursuer on his part was required to find caution *de damnis et impensis*, i.e., for such liability as he might incur under the decree.¹⁵ In early times proceedings in this form were generally followed in all Courts of Admiralty.¹⁶ They form the basis of the action *in rem* as now used in England, the principles of which have been thus stated: "the action *in rem* is an action against the ship itself. It is an action in which the owners may take part if they think proper in defence of their property, but whether or not they will do so is a matter for them to decide, and, if they do not decide to make themselves parties to the suit in order to defend their property, no personal liability can be established against them in that action."¹⁷ Like the action in the Scottish Admiralty Court, the English action *in rem* becomes a personal one on the appearance of the defenders. "The action, though originally commenced *in rem*, becomes a personal action against the defendants on appearance. For what purpose does a party appear to an action *in rem*? There are, as it seems to me, three reasons for the appearance—first, to release the ship so that it may go on trading for the owners; secondly, to contest the plaintiff's allegations that the ship has been in default; and, thirdly, in order to prevent its being sold."¹⁸ It appears, therefore, that the form of action used in the Scottish Court of Admiralty was in substance an action *in rem* as now used in England. Such an action is, however, no longer competent, although the provision of the Court of Session Act, 1830,¹⁹ that "the finding of caution and using of arrestment heretofore observed in the High Court of Admiralty and all regulations relative thereto may be enforced in the foresaid Courts (i.e., the Court of Session and the Sheriff Court) respectively" appears to have been intended to secure its preservation.

¹⁵ Smith's Maritime Practice; Boyd's Judicial Proceedings.

¹⁶ *The "Volant,"* 1842, 1 W. Rob. 383.

¹⁷ *The "Burns,"* 1907, P. (C.A.) 137, Fletcher Moulton, L.J., at 149.

¹⁸ *The "Gemma,"* 1899, P. (C.A.) 285, Smith, L.J., at 292; cf. *The "Dictator,"* 1892, P. 304; *The "Dupleix,"* 1912, P. 8.

¹⁹ 1 Will. IV. c. 69, sec. 23.

(2) **Procedure now Followed.**—Procedure in a maritime cause is now substantially the same as in a common law action, being regulated in the Court of Session by the Court of Session Act, 1850,²⁰ and the Court of Session Act, 1868,²¹ and in the Sheriff Court by the Sheriff Courts (Scotland) Act, 1907.²² Formerly it was customary to mark the prints in such causes “maritime,” in order to mark the nature of the jurisdiction exercised in them, but this distinction has now been abandoned.

(a) **Petitory Action.**—In its most common form it is a petitory action for the payment of a debt. The action is directed against the owner of the ship which is the subject of the claim, and his ship or ships are arrested in security on the same warrant and to the same effect as his other goods and debts. It is only in the event of the shipowner failing to meet his personal obligation or allowing the action to go by default that proceedings *in rem* against the ship or ships may become necessary, by which the vessel or vessels may be sold by order of the Court in a process of sale. The proceedings *in rem*, however, are merely collateral to the main purpose of the action, which is one to enforce payment of a debt, and they are merely a form of diligence, and not to be confused with a proper action *in rem*. For this reason the action is essentially a personal one and distinct from a proper action *in rem* in Admiralty, where the liability is primarily that of the ship and is only indirectly that of the owner.²³ On this ground it has been held in a case where two actions for damages arising out of the same collision were pending, the one in Scotland and the other *in rem* in England, that the plea of *lis alibi pendens* could not be sustained in the English action, since their natures were essentially different.²⁴ As contrasted with the English Admiralty action *in rem*, the distinctive features of the Scottish maritime cause are, firstly, that in the case of a foreign shipowner jurisdiction may be founded against him by arrestment *ad fundandam jurisdictionem* of any property or debts belonging to him and situated within the jurisdiction, irrespective of whether the owner himself or his ship are actually within the jurisdiction or not; and, secondly, that

²⁰ 13 & 14 Vict. c. 36.

²¹ 31 & 32 Vict. c. 100.

²² 7 Edw. VII. c. 51.

²³ *The “Burns,”* 1907 P. (C.A.) 137, Collins, M.R., at 144, Fletcher Moulton, L.J., at 149.

²⁴ *The “Bold Buccleuch,”* 1851, 7 Moo. P.C.C. 267, at 288.

the warrant of arrestment in security contained in the summons authorises attachment of all the owner's ships, goods, and debts situated within the jurisdiction, and not merely, as in the English action, the individual ship which is responsible for the claim. Thus in Scotland it is possible to proceed against a foreign shipowner and secure the debt even if the ship which has given rise to it has been lost at sea or has never proceeded to a Scottish port. Owing, however, to the possible existence of real rights, it is desirable, if possible, to execute the arrestment against the actual vessel which is the subject of the claim.

(b) **Petitory Action with Declaratory Conclusions.**—In certain circumstances a merely petitory action may fail to secure a complete remedy, and it is then necessary to proceed directly against the ship which has given rise to the claim, as in the case of a ship burdened with possessory or maritime liens in favour of the pursuer. Where such liens have attached, the nature of the right conferred by them is such that a remedy lies against the ship itself as well as against its owner at the time when the debt is incurred, and third parties may also incur liabilities, as in the case of an innocent purchaser who has acquired his title to the ship subsequently to the attachment of the lien. Preferences, moreover, may have arisen in favour of third parties which can only be given effect in a competition on the proceeds of the ship itself which has given rise to them. In such circumstances proceedings *in rem* against the ship are necessary, and may be carried into effect by raising an action in which conclusions for declarator of the existence of a real right in the vessel, and for judicial sale in event of non-payment of the debt, are combined with petitory conclusions against the owner personally. In such an action, in addition to the warrant of arrestment obtained on the dependence of the petitory conclusions against the owner which is effectual only to attach his personal interest in the vessel, a special warrant of arrestment *in rem* against the ship is also required²⁵ in order to attach the vessel itself. Such a warrant may be obtained from the Lord Ordinary on the Bills.¹ In an action in this form it is necessary to call all parties interested in the ship, and they should be cited at least edictally.² The

²⁵ *Clan Line Steamers, Ltd. v. "Earl of Douglas" S.S. Co., Ltd.*, 1913 S.C. 967.

¹ *M'Connachie, Petr.*, 1914 S.C. 853; see *infra*, p. 58.

² *Clan Line Steamers, Ltd. v. "Earl of Douglas" S.S. Co., Ltd.*, *supra*, Lord President, at 974.

opinion has been expressed that it is incompetent to direct the action merely against the master in his representative capacity.³ Where a process of sale of the ship is already in dependence, an action in this form is unnecessary, if not incompetent, since the real right can equally well be established and enforced by lodging claims in the process of sale.⁴

(c) *Action in rem*.—In this form also the action, being based primarily on the personal liability of the shipowner, is not a proper action *in rem*, and, since the form of action formerly used in the Court of Admiralty is no longer competent, there is now in Scottish practice no form of action in general use such as will satisfy the conditions of a proper action *in rem*, and so be exempt from the limitation imposed on personal actions by the Public Authorities Protection Act, 1893,⁵ and possibly also by other statutes of limitation. For this reason, an endeavour has recently been made to raise an action in such a form as will include the essential features of a proper action *in rem*, and so escape the limitation imposed on personal actions by that Act.⁶ In the action referred to, judicially described as “the first of its kind in Scotland,” the summons was directed against the public authority, who were the owners of the vessel, by name and in general terms against “all others having or “pretending to have” interest in the said vessel. It contained no petitory conclusions, and proceeded merely on a declarator that the vessel was burdened with a maritime lien in favour of the pursuers, and should be sold by order of the Court and the proceeds applied in satisfaction of the lien. The action was preceded by an arrestment of the vessel *in rem*, the petition for which was served on the named defenders personally and on those unnamed edictally, and the proceedings were therefore good against the whole world. Service was personal on the public authority and otherwise edictal. No exception was taken to the competency of the action, and it was held to be immune from the limitation imposed on personal actions by the Act. The advantages of an action in this form are that, although it is primarily directed against the ship, the summons is in such a form that it effectually brings the action to the notice of all parties interested in the ship,

³ *Moshus v. Moshus*, 1921, 1 S.L.T. 33.

⁴ *Moshus v. Moshus*, *supra*.

⁵ 56 & 57 Vict. c. 61; *The “Burns,”* 1907, P. (C.A.) 137.

⁶ *Ellerman's Wilson Line, Ltd. v. Northern Lighthouses Commissioners*, 1921 S.C. 10 (reported on another point).

whoever they may be and whatever may be the nature of their interest, thus obviating an objection attaching to a maritime action in ordinary form that it does not come to the notice of all parties interested in the ship until the process of sale has been initiated. Jurisdiction is constituted over the ship *ratione rei sitæ* by its arrestment, and no further arrestment against the various defenders *ad fundandam jurisdictionem* is necessary. By entering a claim in the competition which follows the process of sale, a foreign claimant subjects himself to the jurisdiction in the same manner as by appearing in a multiplepinding. This action has since been followed by others in similar form.

(d) **Action of Set and Sale.**—Where there is such complete failure of agreement among the co-owners of a vessel as to render their continued co-ownership impracticable, an application for the judicial sale of the vessel may be made by means of an action of set and sale. The origin of an action in this form is unknown, but it has been said that it is “grounded
“on the consideration that part owners, though not properly
“co-owners, frequently suffer by the contracts or delinquencies
“of shipmasters, perhaps not of their own choosing, for which
“they are answerable at least to the value of their own share.” Since the power of appointing the master and of determining the employment of the ship rests with the majority, the minority would otherwise have no redress except by sale of their shares.⁷ The action may be raised by any one or more of the co-owners, by the executor of a deceased part owner,⁸ and perhaps by a mortgagee in possession, in so far as a sale is necessary to preserve his security. The action is usually raised by a minority of the co-owners, and the Court will be slow to entertain an action by a majority, since a small minority might not be in a financial position to acquire the whole vessel, and the action might thus be used oppressively as a means of getting rid of a minority of owners whose views were not in accordance with those of the majority. It is directed against the remaining co-owners. In form the action is one of declarator, and the summons should contain conclusions for arrestment of the vessel, since otherwise it will not be *in manibus curiæ*, which will then have no jurisdiction to deal with it. Before raising the action it is necessary that the dissenting part owner or owners should have made proposals for a sale by mutual agreement, and that if these are rejected

⁷ Bell, Comm. i., 503, 506.

⁸ *Cowie v. Pyper*, 1901, 17 Sh.Ct.Rep. 306.

he should then have made a formal offer to sell his shares at a certain price, or otherwise to buy those of the defenders at the same price. On rejection of this offer the action may be raised, and should narrate that the offer has been made and rejected.⁹ The action should then conclude for declarator that the defenders ought to accept the pursuers' shares at the price which he has put upon them; or otherwise that they should sell their own to him at the same price; or otherwise that the vessel should be publicly roused and sold by order of the Court.¹⁰ The Court will remit to a person of skill to value the vessel, which will then be exposed for sale at an upset price, which may be fixed at a slightly lower amount than the true value of the vessel in order to stimulate competition. Where the valuation of the valuator differs from that fixed by the pursuers, it is a question of circumstances which will be taken as the upset price. If the pursuers themselves desire to bid for the vessel, it is usual to obtain the consent of the Court. When the pursuers have undertaken the practical conduct and management of the sale, they are in a fiduciary position towards the other co-owners, and it is then uncertain whether they may be entitled to bid. It is obvious that if the pursuers are allowed to bid that it will be in their interests to reduce the upset price as far as possible, whereas if they do not bid it is in their interests to raise it.¹¹ The offer of the pursuer to be valid must be one to sell all his own shares and to buy all those of the defenders,¹² and it will not be met by an acceptance on the part of some only of the defenders.¹³ The power of the Court is clearly equitable in origin, and, since it is necessarily an arbitrary proceeding to force an unwilling owner to part with his vessel, decree will be refused unless reasonable in the circumstances and beneficial to all interests. It is essential that the pursuer should have first used every endeavour to effect an amicable settlement, and should be able to make out a clear case for exercise of the power of the Court. Such a case has been held to have been established when an executor desired to realise and distribute the estate of a deceased part owner and was unable to find a purchaser for his shares.¹⁴ It is possible also that an attempt by a majority of co-owners to convert a copartnership

⁹ Smith's Maritime Practice, p. 48.

¹⁰ Jur. Styles iii., 180.

¹¹ *Morice v. Craig*, 1901, 39 S.L.R. 609.

¹² *Hutton v. Hay*, 1880, 2 Guthrie's Sh.Ct.Rep. 537.

¹³ *Anderson v. Sillars*, 1894, 22 R. 105.

¹⁴ *Cowie v. Pyper*, 1901, 17 Sh.Ct.Rep. 306.

into a limited company and so to alter radically the character of the ownership will also be held to be a reasonable ground for exercising jurisdiction.¹⁵ It is now the general practice of shipowners to regard ownership of a majority of shares in a vessel as carrying with it control of the vessel for all purposes, including that of sale, and it is perhaps for this reason that the action has been judicially described as "exceptional, "anomalous, and very seldom resorted to."¹⁶

(e) **Process of Sale.**—The process of sale provides appropriate procedure by which a vessel may be judicially sold in satisfaction of a debt or debts, and a title *in rem* valid against the whole world conferred on the purchaser. It may be used not only against the actual vessel which has given rise to the claim, but also against any vessel belonging to the defender which has been validly arrested, but in the latter case, of course, such real rights as arise only against the actual vessel in respect of which the claim is brought cannot be enforced. It may proceed either on a warrant of arrestment of the vessel in respect of a debt which has already been constituted or on a decree of constitution where arrestment has already been executed on the dependence of the action. It is, however, competent to combine conclusions for constitution of the debt and for sale of the vessel in the same summons.¹⁷ The defenders are the persons against whom the debt has been constituted. Where the amount of the debt exceeds the value of the vessel, it is important to constitute it against all the co-owners. In itself the process of sale is merely a proceeding against the vessel, and, accordingly, if the debt has not been constituted against any individual part owner, he incurs no personal liability in the process, and his liability is merely to the value of his share in the vessel. Accordingly, in such a case, if it appears to the part owner that his personal liability might exceed the value of his share, he may, by failing to enter appearance, limit his liability to the value of his share.¹⁸ Where other arresting creditors or claimants are known, it is usual to call them also as defenders and to insert conclusions in the summons for a competition on the proceeds. Where arrestment has been loosed on a bond of caution granted jointly and severally by

¹⁵ Cf. *The "Hereward,"* 1895, P. 284.

¹⁶ *Anderson v. Sillars, supra*, Lord Ordinary, at 107.

¹⁷ *Taylor v. Williamson*, 1831, 9 S. 265.

¹⁸ *Boyd's Judicial Proceedings*, p. 46.

cautioners and by the owners, the cautioners should be called as defenders together with the owners.¹⁹

(1) *Form of Summons*.—The summons concludes for sale of the vessel and her boats, furniture, apparelling, and appurtenances²⁰ by public roup, but it is also sometimes expressed to be for the sale of her “tackle, apparel, and furniture.”²¹ The former style is preferable, since the term “appurtenance” has a wider significance than “furniture.”²² In any event, however, it is obvious that the sale merely transfers the property in such subjects as are covered by the warrant of arrestment, the form of which is considered elsewhere.²³ The summons then concludes for payment to the pursuer of the free proceeds remaining after deduction of the necessary expenses of process of selling the said vessel, and of the harbour dues and other charges thereon; for the balance, if any, to be deposited in the hands of the Court; and for adjudication of the vessel to the purchaser free of all encumbrances.²⁴

(2) *Valuation*.—In the event of no appearance being entered for the defenders, a minute is lodged craving warrant for a remit to a valuator to inventory the vessel and value it preparatory to the sale, and for diligence against havers for recovery of the ship's certificate of registry and other papers, without which a valid title cannot be conferred on the purchaser.²⁵ Although the decree of the Court confers a valid title against the whole world, the certificate of registry is necessary to complete the title and show whether the vessel is entitled to the privileges of a British ship. If the cargo still remains on board, the Court, either on motion of the parties interested or *ex proprio motu*, will give notice to its owners that a process of sale is in dependence, and order them to take delivery of it by a certain date, and they will incur liability for any expenses occasioned by detention of the vessel for this purpose beyond the period named. If no notice is taken of the order, the cargo will be sold by order of the Court and the proceeds held for its proper owners.

(3) *Roup*.—On the inventory being returned by the valuator, a second minute is lodged craving warrant for sale

¹⁹ *M'Donald v. Parlane*, 1834, 12 S. 654.

²⁰ *Jur. Styles* iii., 181.

²¹ *Jur. Styles* iii., 177.

²² *The “Dundee,”* 1823, 1 Hagg. Adm. 109.

²³ *Infra*, p. 60.

²⁴ *Jur. Styles* iii., 176.

²⁵ *Jur. Styles* iii., 183.

of the vessel, after due advertisement, at the upset price named by the valuator, under articles of roup adjusted at the sight of the Depute-Clerk of Session and for lodging the proceeds of the sale in bank in name of the Accountant of Court.

(4) *Transfer to Purchaser*.—After the sale has been concluded, a third minute is lodged craving approval of the sale and a finding that the ship belongs to the purchaser, that the pursuer is entitled to the expenses of bringing it to sale, preferably out of the proceeds, and thereafter that he is entitled *primo loco* out of the balance of the proceeds to the sum sued for, or, if the balance is less than the sum sued for, to the whole fund in extinction *pro tanto* of his debt.¹ A successful pursuer in an action of damage acquires a lien on the vessel to the full extent of the owner's interest, which precedes the claim of a mortgagee or a bondholder acquired prior to the period when the damage is done, and, in the event of there being a deficiency in the proceeds, he acquires a right to subsequent accretions in the value of the vessel due to repairs effected at the owner's expense.² The sale confers a title *in rem* on the purchaser valid against the whole world. There appears to be no reason in principle why the pursuer should not himself become the purchaser of the vessel, but in certain circumstances, as where he has undertaken the entire management of the sale, his fiduciary capacity may be such as to debar himself from purchasing.³ A mortgagee may, however, become the purchaser.⁴ The expenses of the sale, including those of harbour dues, watchmen, and other expenses incidental to the custody of the vessel, as also the expenses of valuation, roup, &c., constitute a first claim on the consigned fund.⁵ The pursuer may be allowed his expenses of process out of the fund, even if he does not rank first in the competition, since it is by his efforts that the fund has been placed in Court.⁶

(5) *Competition on Proceeds*.—The Court will then order competing claims on the fund, if any, to be lodged, and an interlocutor of ranking and preference is pronounced as in a multiplepoining.

¹ Jur. Styles iii., 187.

² The "*Aline*," 1839, 1 W. Rob. 111.

³ *Elias v. Black*, 1856, 18 D. 1225, Lord President, at 1230; see *supra*, p. 25.

⁴ The "*Wilsons*," 1841, 1 W. Rob. 172.

⁵ Smith's Maritime Practice, p. 78.

⁶ The "*Immacolata Concezione*," 1883, 9 P.D. 37.

Ranking of Claims.—The ranking of claims, being a question of remedy, is determined by the *lex fori*.⁹ As stated by Bell, the order of preference was—“(1) Lien to ship carpenter. (2) Privilege to mate and seamen for the wages of the voyage. (3) Bottomry creditors, preferred in the inverse order of the date of their advances, and furnishers in a foreign port of the repairs and necessities for the last voyage. (4) Freighters, for their goods which have been sold or lost, and for average loss. (5) Ship’s husband entrusted with the direction and management of the ship, or law agent, provided they hold the muniments of the ship; by lien on these muniments, the one for his advances and engagements, the other for his professional account. (6) Mortgagees or those holding venditions in security, according to the completion of their securities. (7) Other creditors (excluding the master) *pari passu*, unless a preference has been established by diligence. Such preference may be either to the Crown by extent, or to creditors by privilege, pouncing, arrestment, or confirmation as executor-dative, according to the rules of competition.”¹⁰ This order of ranking is not exhaustive, and has to some extent been superseded. The general order of ranking now is, first, the lien of the shipwright founded on possession; secondly, maritime liens which attach from the moment at which the event occurs in respect of which they arise, although they require to be constituted against the ship before they can be enforced; and, thirdly, personal claims which attach from the moment at which diligence is used. Mainly on equitable grounds, however, this order may be to some extent modified.

(1) *Shipwright’s Lien*.—The shipwright’s lien only precedes such maritime liens as have attached after the vessel has come into his possession, and follows those which have attached prior to that date. Similarly, claims for wages earned prior to the vessel coming into his possession precede his lien, and those earned after follow, even although the master and crew remain on board the vessel.¹¹ For similar reasons, where a vessel is dry-docked for repairs after a salvage operation, his lien is postponed to the maritime lien of a salvor which has already attached.¹² The fact that possession has been lost by the arrest-

⁹ *The “Union,”* 1860, Lush. §128.

¹⁰ *Comm. ii.*, 512.

¹¹ *The “Tergeste,”* 1903, P. 26.

¹² *The “Russland,”* 1924, P. 55.

ment and sale of the vessel by the Court in no way prejudices the shipwright's claim, which will be preserved by the Court.

(2) *Maritime Liens*.—Subject to the above rules maritime liens rank after the shipwright's lien. *Inter se* their ranking is governed by two general principles—first claims *ex delicto* precede claims *ex contractu*; second claims *ex contractu* rank in the inverse order of their attachment on the ground that the last act in respect of which the latest claim arises has preserved the vessel for those whose claims are anterior in point of time.¹³ Salvage is in practice treated as arising *ex contractu*, and in this case a statutory modification of the rule is recognised in respect that in all circumstances claims for life salvage precede those for salvage of property.¹⁴ On equitable grounds the maritime lien for wages earned on a vessel damaged by collision precedes the lien for the collision itself, if the wages have been earned before the collision takes place, but it is postponed if they are earned afterwards.¹⁵ The master has a statutory lien similar to that of the seamen for his wages and disbursements.¹⁶ It is, however, postponed to that of the seamen.¹⁷ On equitable grounds his lien may also be postponed to claims for debts incurred by him on behalf of the ship in cases where he is a part owner, and in that capacity renders himself personally liable for the debts. Thus in such circumstances his lien may be postponed to a claim for necessities,¹⁸ or to a bottomry bond on which he is personally liable. If, however, the bottomry bondholder will not be prejudiced by the master ranking before him, the rule does not apply and the master's lien retains its priority.¹⁹ Claims for necessities no longer carry a maritime lien,²⁰ and, accordingly, are now postponed to them. There are no instances of the exercise of a freighter's lien, although it appears to exist in Scots law.

(3) *Mortgages and Personal Claims*.—Mortgages rank after maritime liens, but precede personal claims.²¹ Thus they pre-

¹³ *The "Veritas,"* 1901, P. 304.

¹⁴ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 544 (2).

¹⁵ *The "Elin,"* 1882, 8 P.D. (C.A.) 129.

¹⁶ Merchant Shipping Act, 1894, *supra*, sec. 167.

¹⁷ *The "Salacia,"* 1862, Lush. 545.

¹⁸ *The "Eva,"* 1921, P. 454.

¹⁹ *The "Edward Oliver,"* 1867, 1 Adm. & Ec. 379.

²⁰ *Constant v. Christensen*, 1912 S.C. (O.H.) 1371.

²¹ *The "Mary Ann,"* 1865, 1 Adm. & Ec. 8; "*The Feronia*," 1863, 2 Adm. & Ec. 65.

cede claims for necessities.²² Mortgages become a valid charge on the ship from the date of their completion, and not from that of their registration, which merely affects their priority *inter se*.²³ For this reason they precede personal claims, which only attach from the date when diligence is used.²⁴ The lien of the ship's husband, agent, or law agent over the muniments of the ship cannot now be exercised over the certificate of registry.²⁵ Their right is, therefore, now merely personal. In claims by the Crown procedure by writ of extent has now been superseded by the procedure provided by the Court of Exchequer Act, 1856.²⁶ The residue of the fund, if any, remains in the hands of the Court, which will hold it in trust for the owner of the ship, and he may obtain it by order of the Court. It has been held in England that the residue is not "money belonging to" or a "debt owing to" the owner in the statutory meaning of the words.¹

Proceedings against Freight.—In cases where freight has been deposited in Court, liens and other claims are enforced against the fund in the same manner as against the proceeds of the ship herself. Bell states that "the freight is liable to a "preference for the security of the shipmaster. The ship-master's security is of the nature of a lien, that of the seamen "of the nature of hypothec. Both seem to be preferable to "the merchant's right of compensation or retention."² In addition, however, to his possessory lien, the master has now a maritime lien over the freight for his wages and disbursements of the same nature as that of the seaman for his wages.³ The maritime lien for salvage attaches to the freight of the voyage in the course of which the salvage service was rendered; that for bottomry to the freight of the voyage in respect of which the instrument was granted; and that for damage by collision to the freight which was in the course of being earned, and had already accrued at the time when the damage was done.⁴

Proceedings against Cargo.—Where cargo has been deposited in Court it may be sold by warrant of the Court,

²² *Honeyman & Co. v. Actieselskabet United*, 1910, 26 Sh. Ct. Rep. 243.

²³ Merchant Shipping Act, 1894, *supra*, sec. 33.

²⁴ *The "Two Ellens"*, 1871, 3 Adm. & Ec. 345.

²⁵ Sec. 15.

²⁶ 19 & 20 Vict. c. 56.

¹ *The "Wild Ranger"*, 1863, Br. & L. 84.

² Comm. ii., 512.

³ Merchant Shipping Act, 1894, *supra*, sec. 167.

⁴ *The "Orpheus"*, 1871, 3 Adm. & Ec. 308.

and the proceeds, less freight and other charges, consigned in Court or lodged in a bank, the receipt being deposited with the Clerk of Court.⁵ The proceeds then form a *surrogatum* for the cargo, and liens and other claims may be enforced against the fund in the same manner as in a process of sale of a ship.⁶

In claims against cargo the order of ranking as stated by Bell is — “(1) Shipowner and master for “freight, average, &c., by lien; (2) factor by lien; (3) consignees, including all those who, either by special engagement or by draft on the consignee, may have a legal right to “the funds in his hands; and, in competition with other creditors doing diligence according to the rules of preference “already explained, the Crown by extent, other creditors by “the order of the completion of their rights or diligence.” The maritime liens for salvage and respondentia attach to the cargo. On equitable grounds the possessory lien on the cargo for freight is preferred to the maritime lien under a respondentia bond, on the ground that the carrying of cargo is in the nature of a salvage service to the respondentia bond.⁷

Equitable Power of Sale.—It is probable that the Court has an equitable power, which may be exercised *ex proprio motu* in the event of no application for sale being made, to order the sale of any ship under its arrestment on the ground that expenses are accumulating against her and that she is deteriorating rapidly in value, if such a sale appears to be for the benefit of all parties interested. The proceeds will be held for her true owners. Such a power has been exercised in the case of a perishable cargo.^{7a} In England the Court has a statutory power of sale in such circumstances.⁸

Summary Jurisdiction of Lord Ordinary on the Bills.—The summary jurisdiction in Admiralty of the Court of Session is exercised by the Lord Ordinary on the Bills. On the transference to the Court of Session of the jurisdiction of the Court of Admiralty in “maritime civil causes and proceedings” the Court of Session Act, 1830,^{8a} provided that “all applications “of a summary nature connected with such causes may be made

⁵ *Henderson v. Admiralty Clerks*, 1827, 5 S. 886.

⁶ *Balfour v. Baxter Bros. & Co.*, 1852, 24 Scot. Jur. 290.

⁷ *The Cargo ex “Galam,”* 1863, Br. & L. 167; 2 Moo. P.C.C. 216.

^{7a} *Henderson v. Admiralty Clerks*, 1827, 5 S. 886.

⁸ Rules of the Supreme Court, Order 50, rule 2.

^{8a} 1 Will. IV. c. 69, sec. 21.

“to the Lord Ordinary on the Bills.” It is clear that this provision was intended to add in some way to the common law powers of the Lord Ordinary, but the meaning of the expression “applications of a summary nature” has been nowhere defined. The provision appears to have been intended to expedite procedure. The procedure of the Admiralty Court had been peculiarly expeditious, and special provision had been made whereby appeals from it to the Court of Session might obtain priority. Thus suspensions and reductions of decreets of the Judge Admiral in the Court of Session required to be discussed “in the most expeditious manner in the course of the summary roll,” and in Admiralty causes the *induciae* of summonses of reduction were specially restricted to six days.⁹ It is probable, therefore, that the general intention of the provision was to preserve, as far as possible, the expeditious procedure which had up to that date been followed in maritime causes. The following appear to be “summary applications” within the meaning of the section:—

- (1) Applications for warrants to arrest a vessel *in rem*.¹⁰
- (2) Applications for warrants to arrest a vessel *ad fundandam jurisdictionem*.
- (3) Applications in vacation for a warrant to bring an arrested vessel into a safe harbour.¹¹
- (4) Applications for a warrant to dismantle a vessel.¹²
- (5) Applications for letters of loosing of the arrestment of a vessel.
- (6) Applications in vacation for the recall of the arrestment of a vessel.
- (7) Applications in vacation for warrants to release salvaged property detained by the Receiver of Wrecks in cases where the claim for salvage exceeds £200.¹³
- (8) Applications for warrants to arrest cargo fraudulently shipped from one Scottish port to another.¹⁴
- (9) Applications for the execution in Scotland of a warrant of attachment of a ship issued by the Admiralty Division of the High Court in England.¹⁵

⁹ Admiralty Court Act, 1821 (1 & 2 Geo. IV. c. 39), secs. 3, 4.

¹⁰ *M'Connachie, Petr.*, 1914 S.C. 853.

¹¹ *Turner v. Galway*, 1882, 19 S.L.R. 892.

¹² Codifying Act of Sederunt, E. iii., 3.

¹³ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 552 (3); *Otis v. Kidston*, 1862, 24 D. 419; see *infra*, p. 231.

¹⁴ *MacLachlan v. Macdonald*, 1837, 16 S. 79.

¹⁵ *The “Mathesis,”* 1844, 2 W. Rob. 291.

His concurrence is, however, not necessary for the execution of a warrant of arrestment of a ship contained in the extract registered certificate of an English judgment enforceable in Scotland under the Judgments Extension Act, 1868.¹⁶ Orders and deliverances of the Lord Ordinary on the Bills under his Admiralty jurisdiction are subject to review in the Inner House in the same manner as orders and deliverances under his common law jurisdiction, since the Court of Session Act, 1830, does not either expressly or by implication enact otherwise.¹⁷

Caution.—The rules regarding caution in Admiralty form which were expressly preserved by the Court of Session Act, 1830,¹⁸ are now no longer in force. In the Court of Session such caution was expressly abolished in 1850.¹⁹ In the Sheriff Court caution *judicatum solvi* and *de damnis et impensis* was in 1838 declared to be unnecessary “from any party who shall be “domiciled in Scotland . . . unless the judge shall require it on special grounds to be stated in the interlocutor “requiring the same or a note annexed thereto.”²⁰ This provision has, however, been repealed,²¹ and such caution is therefore now entirely incompetent.

Signeting of Summons.—The Court of Session Act, 1830,²² provided that “summonses in maritime causes instituted in the Court of Session shall be signed by one of the “principal or depute Clerks of Session, and it shall not be “necessary that any such summons should pass the Signet or “require any concurrence for the public interest.” The Court of Session Act, 1838,²³ however, now provides that “summonses “in Admiralty causes may be raised and pass under the Signet “in like manner as other summons before the Court of Session “now do.” This provision is, however, merely permissive, and it appears, therefore, that the former procedure is still competent. In practice, however, summonses in maritime causes in the Court of Session invariably pass the Signet in the same

¹⁶ 31 & 32 Vict. c. 54, sec. 2; *English's Coasting and Shipping Co., Ltd. v. British Finance Co., Ltd.*, 1886, 14 R. 220.

¹⁷ *Otis v. Kidston*, *supra*, Lord Justice-Clerk, at 426.

¹⁸ 1 Will. IV. c. 69, sec. 23.

¹⁹ Court of Session Act, 1850 (13 & 14 Vict. c. 36), sec. 24.

²⁰ Sheriff Court Act, 1838 (1 & 2 Vict. c. 119), sec. 22.

²¹ Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), Second Schedule.

²² 1 Will. IV. c. 69, sec. 40.

²³ 1 & 2 Vict. c. 118, sec. 29.

manner as those in common law actions. In the Sheriff Court the procedure is the same as in an ordinary action.

Court and Agent's Fees.—The Court of Session Act, 1830,²⁴ provided that for conducting maritime causes no agent should be entitled to a higher charge than would have been legally exigible in the Court of Admiralty, and that such causes should not be subject to the fee fund dues of the Court of Session or to fees and demands "on account of any clerk or "officer in that Court." By the Clerks of Session Regulation Act, 1889,²⁵ this provision was repealed, "in so far as it exempts "maritime . . . causes from the ordinary fees exigible in "the Court of Session," and it was provided that "in future "the same fees shall be due and exigible in maritime . . . "causes as are at present exigible in any ordinary action in "the Court of Session." In effect, therefore, the same fees are due in maritime causes in the Court of Session as in ordinary actions. In the Sheriff Court also no distinction is now drawn.

Title to Sue: (a) The Master.—In addition to his personal capacity, the master has also a representative capacity on behalf both of the ship and of her owners, in virtue of which he may both sue and be sued. His capacity to represent the ship appears to have originated in the theory at one time generally held that a maritime cause was in reality one at the instance of one ship against another, and that "so long as you "had the names of the vessels you had really all that was "material. You could ascertain the names of the owners from "the register or otherwise."¹ As representing the owners, his capacity rests on mandate, which need not be express, and extends not only to contract but to delict.² It has been observed that his title to sue as representing the owners "accords with a very old and well-settled practice,"³ but it exists not on behalf of the owners as such, but merely as his employers.⁴ In practice it is now limited to cases where the owners are foreigners. His liability to be sued arises on contracts made by himself,⁵ and it has been held that it arises also

²⁴ *Supra*, sec. 40.

²⁵ 52 & 53 Vict. c. 54, sec. 9.

¹ *The "Assunta,"* 1902, P. 150, the President, at 154.

² *Morison & Milne v. Massa*, 1866, 5 M. 130.

³ *Larsen v. Ireland & Son*, 1892, 20 R. 228, Lord Trayner, at 229.

⁴ *Meikle v. Sneddon*, 1862, 24 D. 720.

⁵ *Pirie & Son v. Warden*, 1867, 5 M. 497.

in the case of contracts made by the ship's agent on her behalf.⁶ It exists also in delict, as in the case of an action for damage by collision.⁷ It exists also on behalf of the cargo owners. Thus actions of salvage may be brought against the master as representing the ship cargo and freight. The right of proceeding against the master may be of value in cases where the true ownership of the vessel is uncertain. By suing him as representing the owners the pursuer may ensure that his employers are made parties to the action, since by arrestment of the vessel against him *ad fundandam jurisdictionem*, jurisdiction is founded against the owners, whoever they may be.

(b) **Alien Enemies.**—Contrary to the general rule of common law, it is competent in special circumstances for an alien enemy to sue in a maritime cause. Thus it has been held that an alien enemy, legally in Scotland under a licence, and not liable to detention, who had been sued in the Court of Admiralty, was entitled to raise a counter action against the pursuer. The decision proceeded on an opinion of the Advocate-General of the English Court of Admiralty that "whatever may be the practice of other Courts, Courts of Admiralty which administer the law of nations in the broadest equity admit exceptions from various causes."⁸ Similarly it has been held in England that alien enemy seamen present in England under licence may sue for wages in the Court of Admiralty.⁹

(c) **Admiralty Commissioners.**—Unlike other Government departments which in Scotland sue through the Lord Advocate, the Admiralty Commissioners may sue and be sued in their own name in all questions "arising out of any matter in anywise relating to the rights, powers, or duties of the Admiralty or to property vested in or purchased by or being under the management or control of the Admiralty."¹⁰ Formerly, when the Admiralty Commissioners were parties to an action, the practice was to allow no expenses to or by either party. It is now provided, however, that "the Admiralty shall be liable and entitled to pay or receive costs according to the ordinary law and practice relating to costs."¹¹ Where, how-

⁶ *Stevenson & Co. v. Brienkopf*, 1906, 22 Sh.Ct.Rep. 163.

⁷ *Morison & Milne v. Bartolomeo*, 1867, 5 M. 848.

⁸ *Burgess v. Guild*, F.C. Jan. 12, 1813.

⁹ *The "Vrouw Mina,"* 1813, 1 Dods, 234; *The "Maria Theresa,"* 1813, 1 Dods, 303.

¹⁰ Admiralty Suits Act, 1868 (31 & 32 Vict. c. 78), sec. 3.

¹¹ Admiralty Suits Act, 1868, *supra*, sec. 5.

ever, in such actions a motion is made directly on behalf of the Crown and not through the Admiralty Commissioners, this provision does not apply.¹²

(d) **Underwriters.**—Underwriters require to sue in the name of the shipowner. They are surrogated to his rights, but acquire no higher right.¹³ Thus, they cannot oppose a plea of *forum non conveniens* on grounds which are not open to their cedents.¹⁴

Conjunction of Actions.—From the nature of the case maritime causes are specially appropriate for conjunction. The general principles which will guide the Court in England in allowing conjunction have been thus stated —“According to my knowledge, the universal practice of the Court has been to consolidate when the decision of each action depends on precisely the same facts; and in salvage suits the Court has gone further, consolidating actions when there are several sets of salvors not rendering precisely the same services. The power of consolidating actions is most beneficial. But for this power the owners of a ship would often be vexed by a host of different actions arising out of one matter—as in a case of collision by all the several owners of cargo in the vessel run down—and the Court could afford no relief, having no power to order the evidence in one action to be taken as evidence in another.”¹⁵ This is, however, frequently done by consent. It is probable that the power of conjunction will be exercised on occasion even in the case of claims of an entirely different nature if they all arise out of the same event, as in the case of a vessel which is damaged in collision with another and at the same time renders salvage services to her.¹⁶ Conjunction has been allowed in the case of claims of the same nature arising on different occasions.¹⁷ The practice applicable to particular forms of claim is considered elsewhere.¹⁸

Citation: (a) Of Seamen.—Under the earlier Citation Acts a seaman with no fixed place of residence, who resided when ashore at his father's house, might be validly cited there.¹⁹

¹² *The "Broadmayne,"* 1916, P. (C.A.) 64.

¹³ *Simpson & Co. v. Thomson*, 1877, 5 R. (H.L.) 40, Lord Blackburn, at 49.

¹⁴ *La Société du Gaz de Paris v. Les Armateurs Français*, 1925 S.C. 332.

¹⁵ *The "William Hutt,"* 1860, Lush. 25, Dr. Lushington, at 27.

¹⁶ *Cf. The "Beta,"* 1884, 5 Asp. M.L.C. 276.

¹⁷ *Hamilton & Co. v. John Fleming & Co., Ltd.*, 1918, 1 S.L.T. 229.

¹⁸ Part II.

¹⁹ *Brown v. M'Callum*, 1845, 7 D. 423.

Similarly, a seaman who was entered as the owner of a vessel which was registered at the port where his father resided might be validly cited at his father's house.²⁰ Under the Citation Amendment (Scotland) Act, 1882,²¹ by which a person may be cited by registered letter at "his last known address" if it continues to be his legal domicile or proper place of "citation," such citation appears to be equally competent.

(b) **Of Classification Societies.**—Lloyd's Association may be validly cited in the name of the association and of its trustees and committee of management in virtue of having a branch office in Scotland²²; and a similar rule appears to apply to other classification societies which have their head or branch offices in Scotland.

Pleading.—In maritime causes dispatch is necessary and appeal is made to the equitable jurisdiction of the Court. Moreover, especially in actions arising from collision, salvage, or towage, the circumstances are frequently such that accuracy of pleading is considerably more difficult than in actions at common law, and it has been pointed out that, while a party may, and is expected to, speak with precision and certainty regarding matters which have occurred in his own ship, his averments regarding matters occurring on his opponent's vessel are in most cases entirely inferential.²³ Material facts, therefore, and new grounds of contention may only emerge after the record has been closed and proof has been led. This is specially liable to occur in collision actions. In England in such cases the rule is that the plaintiff is required to prepare a detailed statement of claim and "to meet any point that may arise upon that claim, and "be prepared further to deal with it without notice unless in "its discretion the tribunal which assesses the damage thinks "it is a matter which should be adjourned for further consideration."²⁴ The defender, however, is allowed a greater latitude, and "an erroneous allegation of the mode in which "the injury occurred made by way of answer to a libel does "not narrow the issue down to the particular fact alleged so "as to entitle the complaining party to recover if the proof

²⁰ *Ballinten v. Connon*, 1852, 15 D. 35.

²¹ 45 & 46 Vict. c. 77, sec. 3.

²² *Henderson v. Lloyd's Association*, 1879, 6 R. 835, Lord Ordinary, at 838.

²³ *The "Amalia"*, 1864, Br. & L. 311, Lord Kingsdown, at 314.

²⁴ *The "Vitruvia" S.S. Co., Ltd. v. Ropner Shipping Co., Ltd.*, 1924 S.C. (H.L.) 31, Lord Phillimore, at 36.

"of it should fail."²⁵ These considerations are applied also in Courts of Appeal, and where a defendant advances a new contention in such circumstances the Court will entertain it without notice to the other party, provided always that it is satisfied that it has before it all the facts bearing on the contention, and that no satisfactory explanation could have been offered by the other party if an opportunity had been offered him in the witness-box.¹ In Scotland, however, less latitude is conceded, and the common law rules appear to be closely adhered to. Thus, it has been held that where the question which has emerged in the course of proof is one which it is absolutely vital to settle, and one which puts an entirely different complexion on the case, and there is neither averment nor plea to support it, it is necessary to amend the record.² In summary applications greater latitude is, of course, allowed. It may be noted that in maritime causes additional evidence in support of a new averment or plea is generally difficult to obtain. "The practice of the Court of Admiralty does not allow of new trials; and considering that from the pursuits and habits of life of seamen, on whose testimony the questions of fact usually depend, it would generally be impossible in such cases to collect them again for a second trial, as well as for other reasons. We think the rule a wise one."³ In Scotland the practice appears to be similar.^{3a}

Tender.—In maritime causes, more particularly in actions for damage by collision or for salvage, the amount due by the defender is peculiarly difficult to estimate, in any event until the proof has reached an advanced stage, and, accordingly, the practice in England is to treat a tender merely as an extrajudicial offer. "The long-established practice in the Admiralty Court was altogether different from the rules which regulate tender at common law. . . . According to the old practice in Admiralty, a tender was nothing more than an offer. If the offer was accepted, there was an end of the action; and, if it was not accepted, the fact that an offer had been made was a circumstance to be taken into consideration by the Court in the exercise of its discretion in awarding costs. . . . I cannot find any case in which it has been held that a tender made in an Admiralty action

²⁵ The "*East Lothian*," 1860, 14 Moo. P.C.C. 177, Lord Chelmsford, at 183.

¹ The "*Tasmania*," 1890, 15 A.C. 223, Lord Herschell, at 225.

² The "*Vitruvia*" S.S. Co., Ltd. v. *Ropner Shipping Co., Ltd.*, *supra*. Cf. *Cambo Shipping Co., Ltd. v. Dampskibsselskabet Carl*, 1920 S.C. 26.

³ The "*Constitution*," 1864, 2 Moo. P.C.C. 453, Lord Kingsdown, at 461.

^{3a} For practice in damage by collision, see *infra*, p. 181.

"not accepted by the plaintiffs has been held to operate as a binding admission of the amount due."⁴ In Scotland, also, the common law rules are to some extent modified. Thus, in cases where actions have been conjoined, or a single action has been raised in respect of separate claims arising on different occasions, it is not necessary that in a tender in respect of one only of the claims the expenses of the whole action should be offered, since it is the practice of the Court to discourage duplication of actions, and it is inequitable that the rights of the defender should be restricted by reason of the fact that a single action has been brought.⁵ The practice applicable to tender in particular forms of claim is considered elsewhere.⁶

Appeal.—The general rule that a superior Court is slow to reverse an inferior Court on a question of fact is specially applicable in appeals from a Court of Admiralty jurisdiction where the facts require to be applied in the light of nautical skill and experience, not only because the judge of the inferior Court has generally had the advice of nautical assessors, but also because by daily experience he has acquired a special knowledge of such matters. "But in these cases of appeal from the Admiralty Court, when the question is one of seamanship, where it is necessary to determine not only what was done or omitted, but what would be the effect of what was done or omitted, and how far under the circumstances the course pursued was proper or improper, their lordships can have but slender means of forming an opinion, and certainly cannot have better means of forming an opinion than the judge of the Admiralty Court . . . any judge who sits from day to day in such cases must necessarily acquire a knowledge and experience to which ordinary members of this board cannot pretend."⁷ In Scotland, where maritime actions may be brought before any of the common law judges of first instance indifferently, the latter consideration has, of course, less weight. In cases where the nautical assessors in the inferior Courts have tendered advice which is inconsistent with what the Court of Appeal holds to be the facts, the Court of Appeal will generally yield to the authority of the Court of origin.⁸ Where, however, the Court of Appeal is itself

⁴ *The "Mona,"* 1894, P. 265, Bruce J., at 268.

⁵ *Hamilton & Co. v. John Fleming & Co., Ltd.,* 1918, 1 S.L.T. 229.

⁶ Part II.

⁷ *The "Julia,"* 1860, 14 Moo. P.C.C. 210, Lord Kingsdown, at 236.

⁸ *The "Minnehaha,"* 1861, 15 Moo. P.C.C. 133, Lord Kingsdown, at 160.

assisted by nautical assessors, and completely different advice is tendered by these two sets of assessors, the Court of Appeal will form an independent opinion under the guidance of its own assessors.⁹ The House of Lords will not disturb concurrent findings of fact in two inferior Courts except on tolerably clear evidence, and this rule operates with special force in cases where the findings of the inferior Courts rest on considerations of probability.¹⁰ In cases where the judgment of an inferior Court founded on a proof is reviewed by the Court of Session, the Court of Session is required by statute to pronounce final findings in fact which are not subject to review in the House of Lords.¹¹ At the date of this enactment the inferior Courts had no jurisdiction in Admiralty, and the provision is therefore not directly applicable to maritime causes. In practice, however, it is so treated.

Priority.—Maritime causes no longer receive priority except on special cause shown. Formerly appeals from the Court of Admiralty to the Court of Session were specially expedited. Thus, the Act 1681 provided that “suspensions or stops” to the execution of the decreets or acts of the Court of Admiralty should “be summarily discussed upon a bill and be privileged “and exeemed from the ordinary course of the roll.” Similarly the Admiralty Court Act, 1821,¹² provided that “suspensions “and reductions” of decreets of the Judge Admiral “in a “matter of maritime jurisdiction” should be discussed “in the “most expeditious manner in the course of the summar roll,”¹³ and in maritime causes the *induciae* of summonses of reduction were restricted to six days, “whether the defender or defenders “be within Scotland or forth thereof.”¹⁴ Appeals in maritime causes, however, no longer receive priority, except in so far as a special case for expedition is made out, in which case they may be sent to the summar roll, or set down for early hearing.

Forum non conveniens.—In Scotland the plea of *forum non conveniens* is more readily sustained than in England. “The doctrine of *forum conveniens*, which in England seldom

⁹ *The “Falkland”*: *The “Navigator,”* 1863, 1 Moo. P.C.C. (N.S.) 379, Lord Chelmsford, at 383.

¹⁰ *The “P. Caland,”* 1893 A.C. 207, Lord Watson, at 216.

¹¹ Court of Session Act, 1825 (6 Geo. IV. c. 120), sec. 40.

¹² 1 & 2 Geo. IV. c. 39.

¹³ Sec. 3.

¹⁴ Sec. 4.

“comes into consideration when jurisdiction exists apart from service of process abroad, unless there is an actual competition of suits, is in Scotland carried further, and may prevent the exercise of jurisdiction when the Court is satisfied that the suit might have been brought and effectively prosecuted in a more convenient forum, although this may not actually have been done.”¹⁵ In both countries, however, the general principle which is applied is the same, namely, that the Court will interfere to sustain the plea in order to prevent vexatious proceedings which might have the effect of impeding the due administration of justice.¹⁶ In Scotland the essential basis of the plea is not the mere personal convenience of the Court or of the defender, but the question whether another tribunal is open which is more suitable for the interests of all parties concerned and the ends of justice.¹⁷ If such a tribunal is not open, jurisdiction, if properly founded, will almost invariably be exercised. Thus it has been exercised in an action for the cost of necessary repairs to a German vessel damaged by stranding in England, in a case where a previous action had been dismissed in Germany on purely technical grounds.¹⁸ In maritime causes the circumstances are to some extent special. In such causes the plea usually falls to be considered in cases in which jurisdiction has been founded against a foreign defender by the arrestment of his property—generally a ship—within the jurisdiction. If the property arrested is the ship herself which has given rise to the claim, such rights *in rem* as attach to her in respect of the claim may be enforced against her directly in the Scottish Court; whereas, if jurisdiction is declined, the pursuer may be compelled to sue the defender personally in his own forum, and if in the interval the ship happens to be lost at sea the remedy *in rem* will be destroyed. Thus, in the case of collisions which give rise to maritime liens, it has been observed that the forum within which the collision has occurred, and the bulk of the evidence is to be found, is a more convenient forum than that of the defender’s domicile.¹⁹ In cases of salvage this consideration is of particular weight, since in such cases the first and most proper remedy is *in rem*. If the property arrested is a ship other

¹⁵ *Orr Ewing's Trustees v. Orr Ewing*, 1885, 13 R. (H.L.) 1, Lord Selborne, L.C., at 7.

¹⁶ *Logan v. Bank of Scotland (No. 2)*, 1906, 1 K.B. 141, the President, at 149.

¹⁷ *La Société du Gaz de Paris v. Les Armateurs Français*, 1925 S.C. 332.

¹⁸ *Meier v. Küchenmeister*, 1881, 8 R. 642.

¹⁹ *Gibson v. Smith*, 1849, 11 D. 1024, Lord President, at 1026.

than that which gives rise to the claim, since in that case no maritime lien attaches, the weight of this consideration is *pro tanto* diminished. It is of minor importance that foreign maritime law may require to be applied, since maritime law is *jus gentium* and requires constantly to be applied in maritime causes, and it has been observed that "if it be a question arising out of the *jus gentium*, we are as well instructed in that as any other Court."²⁰ Even if the foreign law is of a purely municipal character, the Court will generally entertain the action, as in cases concerning wages, bottomry, or mortgage.²¹ Certain claims are, however, in a special position. Thus it is contrary to the public interests of a State that a foreign tribunal should exercise an indiscriminate jurisdiction concerning the possession or ownership of its vessels. In England it is necessary to intimate the dependence of an action of possession *in rem* against a foreign vessel to the Consul of the State to which the vessel belongs,²² and opinion has been reserved "whether under any circumstances the Admiralty Court would entertain an action for possession between foreigners except in a case where the foreign sovereign consented."²³ It is probable that the plea will be upheld if it appears that parties have taken advantage of the temporary presence of the vessel within the jurisdiction to have a question of title determined which depends on the municipal law of another country, but it has been observed that there is no settled rule that a Court of Admiralty jurisdiction will decline to entertain actions of possession in respect of foreign ships except at the request of both parties and with the consent of the accredited representative of the State to which the vessel belongs.²⁴ In the case of claims for wages also intimation of the dependence of an action *in rem* to the foreign Consul is necessary,²⁵ since by the law of many States Consuls have themselves power to adjudicate in such claims. Moreover, it may obviously be a serious inconvenience to detain a foreign vessel in the course of performing a voyage for a trivial claim for wages which an investigation may prove to be unfounded, and for this reason British seamen are forbidden to sue abroad

²⁰ *Clements v. Macaulay*, 1866, 4 M. 583, Lord Benholme, at 595.

²¹ *The "Annette": The "Dora"*, 1919, P. 105, Hill, J., at 114.

²² Rules of the Supreme Court, Order 5, rule 16.

²³ *The "Jupiter"*, 1924, P. (C.A.) 236, Scrutton, L.J., at 243.

²⁴ *The "Jupiter (No. 2)"*, 1925, P. (C.A.) 69.

²⁵ Rules of the Supreme Court, Order 5, rule 16.

for wages except in certain specified cases.²⁶ In England, if the Consul protests on stated grounds, the practice is to investigate these before entering the action, but if he protests without stating grounds to exercise jurisdiction nevertheless.²⁷ The practice applicable to particular claims is considered elsewhere.²⁸

Foreign Judgments.—The general principle of law is that personal decrees in absence of foreign Courts are refused recognition, but that personal decrees *in foro*, provided that the defender has appeared voluntarily to defend the action and not merely to save the property arrested, are recognised, and will be enforced as between the parties concerned.²⁹ A petition for recall of the arrestment of a ship is not in Scotland a voluntary submission to the jurisdiction.³⁰ Decrees *in rem*, whether in absence or *in foro*, are conclusive against the whole world³¹ as regards the *status* of the *res*,³² provided that the Court is one of competent jurisdiction and that the proceedings are regular. This may be remitted to proof.¹ With reference to a decree *in rem* against a ship, it has been observed that “it is important that the judgment should show “on the face of it that the proceedings against the vessel are “not merely against the owners as such or the captain, but “that the proceedings had in contemplation the ultimate sale “of the ship and a judgment ordering the ship to be sold,” since otherwise the title of the purchaser of the vessel at the judicial sale, being merely personal, will have nothing to support it.²

Extraterritorial Recognition of Scottish Judgments.—It follows from the above principles that a personal decree in absence in Scotland based on the arrestment *ad fundandam jurisdictionem* of a ship will not receive extraterritorial recognition. The Judgments Extension Act, 1868,³ expressly excepts from its provisions “any decree in absence in any “action proceeding on arrestment to found jurisdiction in Scot-

²⁶ Merchant Shipping Act, 1894, *supra* (57 & 58 Vict. c. 60), sec. 166 (11).

²⁷ *The “Nina,”* 1867, 2 P.C. 38.

²⁸ Part II.

²⁹ *Schibaby v. Westenholz*, 1870, 6 Q.B. 155.

³⁰ *Goodwin & Hogarth v. Purfield*, 1871, 10 M. 214.

³¹ *Castrique v. Imrie*, 1870, 4 Eng. & Ir. App. 414.

³² *Ballantyne v. Mackinnon*, 1896, 2 Q.B. 455, Smith, L.J., at 462.

¹ *Det Norske Bjergnings og Dykker Compagni v. M'Laren*, 1885, 22 S.L.R. 861.

² *The “City of Mecca,”* 1881, 6 P.D. (C.A.) 106, Lushington, J., at 116.

³ 31 & 32 Vict. c. 54, sec. 8.

"land." A decree *in foro* for payment of a debt in a petitory action will be recognised only as between the parties to it. If based merely on an arrestment *ad fundandam jurisdictionem*, it has been doubted "whether a decree given against a "foreigner would be effective and receive international recognition beyond the value of the goods so arrested in Scotland."⁴ If, however, payment is refused and the decree is followed by a process of sale, the title of the purchaser of the ship being *in rem* will be recognised, as will also the decree in the competition on the proceeds of the sale which follows, since the competition, being in the nature of a multiplepounding, is a proceeding *in rem*.⁵ A decree which is declaratory of a maritime lien which is universally conceded to be a real right will be recognised.

Proof of Foreign Law.—In maritime causes, in any event in England, the Court requires less exact proof of foreign law in matters of merely technical proof than in actions at common law. The reasons for the practice have been thus summarised—such causes frequently originate in distant parts of the world, and if the common law rules of evidence were strictly adhered to difficulty might be experienced in obtaining adequate evidence of the facts in which the foreign law was to be applied from seafaring witnesses who are constantly traversing the high seas; Courts of Admiralty jurisdiction require to proceed with the utmost expedition, and great expense and delay might be incurred by adhering strictly to the common law rules of proof; such causes are generally tried without juries, and it may safely be left to the Court to weigh evidence which might not be safely entrusted to a jury. Thus, in a question whether a person was a duly licensed pilot according to Indian law, it has been held that an Indian Act was sufficiently proved by a clerk of the India House producing a copy of the Act officially forwarded by the Indian Government to the India House.⁶ It is uncertain how far English practice will be followed in Scotland, but it may be pointed out that the general policy of the Merchant Shipping Act, 1894, which is in force in Scotland as well as in England, is to dispense with exact rules of evidence as regards the proof of those documents to which it refers.⁷

⁴ *La Société du Gaz de Paris v. Les Armateurs Français*, 1925 S.C. 332, Lord Hunter, at 355.

⁵ *Castrique v. Imrie*, 1870, 4 Eng. and Ir. App. 414.

⁶ *The "Peerless"*, 1860, Lush. 30, Dr. Lushington, at 41.

⁷ Cf. secs. 694, 695.

Maritime Liens.—A maritime lien is “a privileged claim upon
 “a vessel in respect of service done to it or injury caused by
 “it to be carried into effect by legal process. It is a right
 “by one over a thing belonging to another—a *ius in re aliena*.
 “It is, so to speak, a subtraction from the absolute pro-
 “perty of the owner in the thing.”⁸ In Scots law maritime
 liens have been treated as hypothecs,^{9a} but this classification
 is not entirely accurate, since the holder does not acquire a
 right of property or possession in the subject, but only a right
 to a preferential ranking on its proceeds after it has been
 brought to a judicial sale in the event of non-payment of the
 claim in respect of which the lien arises. It has been observed
 that a maritime lien “is not a right to take possession or to
 “hold possession of the ship. It is confined to a right to take
 “proceedings in a Court of law to have the ship seized and if
 “necessary sold. . . . The right of maritime lien appears,
 “therefore, to be essentially different from a right of property,
 “pledge, or hypothec,” and that it is uncertain “whether a
 “maritime lien is properly to be regarded as a step in the
 “process of enforcing a claim against the owner of a ship,
 “or as a remedy or partial remedy in itself, or as a means
 “of securing a priority of claim.”⁹ The precise nature of
 the right, therefore, is uncertain. The lien is derived from
 the owner of the ship, and must have its root in his personal
 liability.¹⁰ It need not, however, arise directly through him,
 but may arise through some person deriving temporary owner-
 ship or possession from him.¹¹ Thus, it may arise while
 the vessel is in the control of a charterer by demise or of
 a mortgagee in possession, in which case the owner may have
 his interests subjected to a maritime lien, although he is
 not personally liable for the claim out of which the lien
 arises.¹² For similar reasons an innocent purchaser may be
 subjected to a lien existing prior to the date of his purchase.¹³
 It does not, however, arise when the vessel is under requisition
 by the Government, since the transfer to the Govern-
 ment is involuntary.¹⁴ The “claim or privilege travels with

⁸ *The “Ripon City,”* 1897, P. 226, Gorell Barnes, J., at 242.

^{9a} Bell’s Comm. ii., 39.

⁹ *The “Tervaele,”* 1922, P. (C.A.) 259, Atkin, L.J., at 267.

¹⁰ *The “Castlegate,”* 1893 A.C. 38, Lord Watson, at 52.

¹¹ *The “Tervaele,”* *supra*, Scrutton, L.J., at 270.

¹² *The “Ripon City,”* *supra*, Gorell Barnes, J., at 244.

¹³ *The “Bold Buccleuch,”* 1851, 7 Moo. P.C.C. 267.

¹⁴ *The “Sylvan Arrow (No. 2),”* 1923, P. 220.

"the thing into whosoever possession it may come . . .
 "but it is not necessary to say it is indelible, and may not
 "be lost by negligence or delay or bad faith. It is inchoate
 "from the moment of attachment, and when carried into
 "effect by legal process it dates back to the period of its
 "first attachment."¹⁵ The lien covers both the freight which
 is due and the cargo in so far as it is liable for the freight,
 but in both cases it is subsidiary to that on the ship, and
 cannot exist independently of it.¹⁶ It covers also the
 expenses of enforcing it, which may be of importance in
 undefended actions where there are competing claims against
 the ship.¹⁷ From the nature of the right maritime liens are
 not transferable, except in the case of instruments of bottomry
 or respondentia. In Scotland, however, it has been held that
 the lien for seamen's wages transmits to the payer of the
 wages without formal assignation if the payment is made on
 the credit of the ship and not on that of the owner¹⁸; and in
 England a similar decision has been reached on the ground
 that the claim of the person who pays the wages is itself
 in the nature of a wages claim.¹⁹ More recently, however,
 a doubt has been expressed whether any contractual assigna-
 tion of a debt or claim supported by a maritime lien can
 carry with it the benefit of the lien.²⁰ Unlike an ordinary
 claim *in rem*, which only arises when the action is instituted,
 the maritime lien attaches from the moment at which the
 event occurs which gives rise to it.²¹ Its existence being a
 question of remedy is determined by the *lex fori*, and not
 by the law of the place where it attached.

Evidence: (a) Of Seafaring Witnesses.—Since seamen are engaged in a hazardous occupation and are constantly at sea, there is danger of their evidence being entirely lost, or in any event of their not being available as witnesses at the date of a trial. At the same time their evidence is usually of the greatest importance, more particularly in actions arising from collision, salvage, or towage, where they are necessarily the only persons present at the event, and it is therefore highly

¹⁵ *The "Bold Buccleuch," supra*, Sir John Jervis, at 284.

¹⁶ *The "Castlegate," supra*.

¹⁷ *The "Margaret,"* 1835, 3 Hagg. Adm. 238.

¹⁸ *Clark v. Bowring*, 1908 S.C. 1168.

¹⁹ *The "William S. Safford,"* 1860, Lush. 69.

²⁰ *The "Petone,"* 1917, P. 198.

²¹ *The "Two Ellens,"* 1872, 4 P.C. 161, Mellish, L.J., at 169.

desirable that the judge who is to try the case should have an opportunity of both seeing and hearing them. For this purpose, where they are unable to be present at the trial, it is frequently possible to fix a special diet of proof at a date when the witness is within the jurisdiction, but if for any reason this course is not practicable, a commission may be obtained to take the evidence on commission either before proof has been allowed, to lie *in retentis* till the trial takes place,²² or after proof has been allowed.²³ In accordance with the rule that the best evidence available should be tendered, the latter course, wherever possible, should be followed. Where the evidence has been taken before proof has been allowed it has been held that there is no presumption, in any event in the case of a foreign seaman, that subsequent examination will be practicable, and, accordingly, no duty rests on the party tendering such evidence to re-examine the seaman after proof has been allowed, since the only result of such a course might be that "after following him from one port to another at very great expense there is only got a deposition that is somewhat worse than that already in the hands of the Court." The onus, therefore, of showing that re-examination after proof has been allowed is practicable, or that the witness can be adduced at the trial, rests on the party objecting to the evidence so taken.²⁴ When the seaman is in the course of a voyage to an unknown destination the commission for examination may take the following form:—"The Lords grant commission to —, whom failing, to —, also to any British Consul at any foreign port for the examination of —, now in the ship — on a voyage to —." ²⁵ The Act of Sederunt of 16th February, 1841, although not included in the Codifying Act of Sederunt, is in the main declaratory of the present law and practice, and by decision its application has been extended also to proofs.¹ In commissions to be executed within the United Kingdom interrogatories may now in all cases be dispensed with, and in commissions to be executed abroad, on the Court "being satisfied that such a course is most expedient in the interests of the parties to the cause and most inductive to the administration of justice."² In actions for damage by collision, sal-

²² *Pringle, Petr.*, 1905, 7 F. 525; *Scott, Petr.*, 1866, 4 M. 1103.

²³ Act of Sederunt, 16th Feb., 1841, sec. 17.

²⁴ *Boettcher v. Carron Co.*, 1861, 23 D. 322, Lord Cowan, at 326.

²⁵ *Napier v. Leith*, 1859, 21 D. 1154.

¹ *M'Lean & Hope v. Fleming*, 1867, 5 M. 579.

² Codifying Act of Sederunt, B. ii., 2.

vage, or towage, where the facts of the case frequently only emerge in the course of the trial, it is often most convenient to dispense with interrogatories in commissions executed abroad. Moreover, foreign seamen are frequently better able to describe the events in narrative form.

(b) Of Official Log-Book.—By statute any entry made in an official log-book in the manner provided in the Merchant Shipping Act is “admissible in evidence.”³ The extent to which it is “admissible in evidence” has never been determined. It is probable that it is admissible in evidence in proceedings under the Merchant Shipping Acts as regards offences entered therein, but that in civil proceedings for damage at common law arising out of the offence the ordinary method of proof must be followed.⁴ The official log-book is a document of a special character. It contains a number of entries relative to discipline and other matters, which are unconnected with the navigation of the ship, and is rather in the nature of a report by the master, as representative of the State, to the Board of Trade than of a confidential document passing between him and the owner of the ship.

(c) Of Ship's and Engineer's Log-Books.—The ship's log-book usually kept by the chief officer, and the engineer's log-book may also be used in evidence.⁵ The ship's log-book is, however, merely “a statement made by the master of the ship “at a time being contemporaneous with the event, and therefore more likely to be correct, and it is used for the purpose “only of correcting a statement made at a subsequent time.”⁶ It is not *per se* evidence of any fact on behalf of the ship to which it belongs, even in cases where the death of the master or chief officer has already taken place.⁷ It may be used against the ship, but it is not conclusive, and the Court will decide entirely on the probabilities of the case.⁸

(d) Of Other Shipping Documents.—Entries in the books of the coastguard and in lighthouse log-books may be used to prove

³ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 239 (6).

⁴ *Sharp v. Rettie*, 1884, 11 R. 745.

⁵ *The “Earl of Dumfries,”* 1885, 10 P.D. 31.

⁶ *The “Singapore” and The “Hebe,”* 1866, 1 P.C. 378, Lord Westbury, at 382.

⁷ *The “Henry Coxon,”* 1878, 3 P.D. 156.

⁸ *The “Singapore” and The “Hebe,” supra.*

the state of the wind and weather at the time of a collision.⁹ Meteorological returns are also legitimate source of evidence for this purpose, and may be confirmed by the log-books of the ship or lighthouses.¹⁰ Protests may be evidence against the owners or master.¹¹ They should always be produced in evidence, not only because the statement is made while the facts are fresh in the memory of the person deponing, but also because they are made and sworn *alio intuitu*. They are especially valuable in salvage actions, since it is in the interest of the deponent at the moment to magnify the damage, whereas in the action which follows it will be in his interest to minimise it.¹²

The following documents have been held not to be admissible in evidence:—Depositions made before a Receiver of Wrecks¹³; the record of proceedings at a Court of inquiry under the Merchant Shipping Act¹⁴; at a naval Court-martial¹⁵; at an inquiry by a pilotage authority¹⁶; and at a coroner's inquest,¹⁷ but they may be referred to for the cross-examination of a witness who has given evidence-in-chief inconsistent with his previous statement. In collision actions the Board of Trade usually refuses to supply copies of depositions made for the purposes of an investigation or inquiry by those on board of one ship unless those on board of the other have also made them. By the Merchant Shipping Act the common law of evidence is modified in the case of the depositions of witnesses who cannot be found in the United Kingdom¹⁸; attestation of documents¹⁹; proof of documents which are admissible in evidence under the Act²⁰; and exemptions in relation to any offence under the Act.²¹

(e) Of Confidential Reports by Ship's Officers.—In England letters from the master to the owners are admissible in evidence

⁹ *The "Catherina Maria,"* 1866, 1 Adm. & Ec. 53; *The "Maria das Dores,"* 1863, Lush. 27.

¹⁰ *Williams v. Dobbie*, 1884, 11 R. 982, Lord Shand, at 988.

¹¹ *Scott v. Portsoy Harbour Co.*, 1900, 8 S.L.T. 38.

¹² *The "Emma,"* 1844, 2 W. Rob. 315, Dr. Lushington, at 317.

¹³ *The "Little Lizzie,"* 1871, 3 Adm. & Ec. 56; but see *infra*, p. 230.

¹⁴ *The "Mangerton,"* 1857, Swa. 120.

¹⁵ *H.M.S. "Swallow,"* 1857, Swa. 30.

¹⁶ *The "Lord Seton,"* 1845, 2 W. Rob. 391.

¹⁷ *The "Mangerton," supra.*

¹⁸ Sec. 691.

¹⁹ Sec. 694.

²⁰ Sec. 695.

²¹ Sec. 697.

on the same grounds and to the same extent as the log-book, but only regarding what the master did and saw or the orders which he gave, and his opinions expressed in such letters are not.²² His declaration need not be rejected as hearsay merely because he was not on deck at the moment when the events described occurred.²³ In Scotland commissions and diligence have been obtained to recover not only reports by the master, but also reports by the officers and engineers to the owners and communications passing from the owners to the master, officers, and engineers.²⁴ It has, however, been held that the rule is confined to writings passing *de recenti*, and that writings which have passed *post litem motam*, that is, not merely after the summons has been raised, but as soon as it is apparent that litigation is going to ensue, cannot be recovered.²⁵ The rule in England is similar. It has been held in England that a document brought into existence after litigation is pending, threatened, or anticipated for the purpose of furnishing solicitors with evidence and information is privileged, and need not be disclosed. It is a frequent practice of shipowners to issue standing orders to their masters to furnish detailed reports for the information of their solicitors after every casualty, since collisions are almost invariably followed by litigation. Such reports are privileged under the above rule.¹ It has been observed, however, that recovery of documents under a commission and diligence is a perfectly distinct question from that of their admissibility in evidence, and that, whether or not the decision in the "*Solway*" case truly represents the law of England, it certainly does not represent that of Scotland, and that, although in Scotland such writings are recoverable to be used to refresh the memory or in cross-examination, they are not admissible in evidence against the owners of any fact contained in them.² In England a distinction is drawn between statements made by the master and those made by other officers or by seamen or pilots. A statement by the master is evidence against the owner, since he is his agent to make admissions.³ Statements

²² *The "Solway,"* 1885, 10 P.D. 137.

²³ *The "Acteon,"* 1853, 1 Spinks, 176.

²⁴ *The "Talisman" v. The "Tyne,"* 1897, 4 S.L.T. 63; *Burnjeat v. City Line, Ltd.,* 1897, 4 S.L.T. 284.

²⁵ *Scott v. Portsoy Harbour Co.,* 1900, 8 S.L.T. 38.

¹ *The Hogger No. 13,* 1925, P. 52.

² *The Admiralty v. Aberdeen Steam Trawling and Fishing Co., Ltd.,* 1909 S.C. 335, Lord President, at 340.

³ *The "Acteon,"* 1853, 1 Spinks, 176.

by other persons on board, however, are only admissible as part of the *res gestæ*.⁴

Recovery of Documents under Commission and Diligence.

—A commission and diligence for the recovery of documents will always be refused on the grounds of confidentiality at the request of the Admiralty, even although the Admiralty is itself pursuer in the action, since the public interest is paramount. In such cases an affidavit of confidentiality by the Secretary of the Admiralty is sufficient, and the oath of the First Lord is unnecessary.⁵ It is probable that a similar rule will be followed in the case of other Government departments. In a case where it was averred that the employment of the ship was illegitimate, a commission and diligence was granted to recover, in addition to the log-book, the ship's articles, and all books, journals, reports, &c., relative to the previous and earlier voyages.⁶ In a case where it was averred that a ship was being fitted out to be employed in hostilities against a friendly power, a commission and diligence was granted to recover all drawings, sketches, or plans of the ship, but refused for recovery of models of the ship, and also for the whole equipment, fittings, and furnishings of the ship in so far as not already seized. The Court expressed a doubt whether a commission and diligence against havers was an appropriate method for recovering the latter, and, accordingly, a petition was subsequently presented to the Lord Ordinary in Exchequer for an order for their delivery and for a search warrant for that purpose, but, the case being settled, the competency of this form of procedure was not determined.⁷

Expenses: (a) Of Seafaring Witnesses.—Owing to the importance of their evidence, the expenses of detaining seafaring witnesses ashore or of bringing them from abroad is generally allowed as an expense of process, provided that the party adducing them has acted reasonably in incurring the expenditure. It has been observed that "the answer to that question " must depend upon the importance of enabling the Court to " hear the witnesses giving evidence in person, the nature and " importance of the evidence, the expenses incurred as compared with the importance of the case, which is not neces-

⁴ *The "Schwalbe,"* 1859, Swa. 521.

⁵ *The Admiralty v. Aberdeen Steam Trawling and Fishing Co., Ltd., supra.*

⁶ *Van Engers Rocclofs & Co. v. Ellis Hughes,* 1898, 6 S.L.T. 90.

⁷ *H.M. Advocate v. Fleming,* 1864, 2 M. 1032.

“sarily measured solely by the amount of money involved.”⁸ In Scotland the Court follows the general principle that only such expenses as are absolutely necessary will be allowed. The test of necessity is not the prudent character of the expenditure from the point of view of the party incurring it, but from that of the case itself. In the case of witnesses resident abroad the evidence should, if possible, be taken on commission. In a case where six witnesses had been brought from abroad the expenses of two only were allowed, and, in addition, a sum equal to the cost of examining the remainder on commission abroad.⁹ Where witnesses had been detained ashore for two months and ten days prior to a trial, a detention allowance of only ten days was given for each as being approximately an equivalent of the expenses of a special diet of proof or of a commission, and no allowance was made for the cost of victualling, since that was covered by the wages paid to them.¹⁰ Similarly, where four witnesses had been detained ninety-six, fifty-five, twenty-nine, and eighteen days respectively, an allowance of £1 a day for fourteen days for three and £1 a day for seven days for one was given, no allowance being made for differences of rating.¹¹ There is no authority for making allowance for time spent on board ship.¹² The question whether the expenses of detaining a seafaring witness for a postponed diet of proof will be allowed is one of circumstances. Allowance will generally be made for a short period of detention, in any event if the expense of executing a commission and diligence would have been greater.¹³

In England the sum allowed is regarded as entirely dependent on circumstances regarding which no definite rules can be formulated beyond the general proposition that “the assistant registrar must award reasonable compensation to a person of the class of the witness, taking into account all the circumstances and considering the wages which the witness was earning about the time of detention, not as an absolute measure, but an important indication and guide of what is fair. The fact that all persons are under an obligation to give evidence when called upon should also not be

⁸ *The “Ibis VI.”* 1921, P. (C.A.) 255, Sterndale, M.R., at 260.

⁹ *Laird Line, Ltd. v. United States Shipping Board*, 1924 S.C. 943.

¹⁰ *Clan Line Steamers, Ltd. v. Campania Navigation Sota y Aznar*, 1918 S.C. 87.

¹¹ *Ellerman Lines, Ltd. v. Dundee Harbour Trustees*, 1922 S.C. 646.

¹² *Woodwark v. Woodwark, &c.*, 1910, 2 S.L.T. 248.

¹³ *Parker v. North British Railway Co.*, 1900, 8 S.L.T. 18.

"ignored."¹⁴ The above direction is only applicable to the case of ordinary seamen whose wages normally represent only a living wage, and does not apply to other ratings or to persons remunerated by a share of the profits of a fishing voyage, regarding whom no direction can be given.¹⁵ In the case of a foreign seaman a reasonable sum for agency or interpretation may be allowed.¹⁶ In special circumstances the expenses of detention of a witness before an action has been raised, after the trial has terminated, of a witness not called, of a substitute on board the vessel from which a witness has been taken, have been allowed.¹⁷

(b) **Of Commission and Diligence.**—The expenses of executing a commission and diligence where its necessity is doubtful will not be allowed. Thus, where a witness's ship was due to sail before the trial commenced, and a commission to take evidence was granted, but it subsequently appeared that the sailing would be postponed till after the trial, the expenses of the commission and diligence were disallowed, it being observed that, although the execution of the commission might be a proper precaution in the circumstances, its expense was not a proper charge against the other party.¹⁸

(c) **Of Detention of Ship and Other Expenses.**—The expenses of detention of a ship for a trial are not allowed, since these are properly in the nature of demurrage and one of the inconveniences to which parties may be exposed by litigation.¹⁹ The fees of a marine surveyor and of a business man employed to report on the condition of a salvaged ship and cargo to enable the salvors to determine whether a tender should be accepted or not may be allowed if reasonable.²⁰ Where claims for damage to cargo are numerous, a reasonable allowance may be made in respect of an average adjuster's statement.²¹ In exceptional circumstances the fees of a marine surveyor in an action for damage by collision may be allowed.²²

¹⁴ *The "Ibis VI."*, *supra*, Sterndale, M.R., at 261.

¹⁵ *The "Ibis VI."*, *supra*, Younger, L.J., at 271, 273.

¹⁶ *The "Karla"*, 1864, Br. & L. 367.

¹⁷ Roscoe's Admiralty Practice, pp. 423-4.

¹⁸ *Spiera v. Caledonian Railway Co.*, 1921 S.C. 889.

¹⁹ *The "Elswick Grange"*, 1912, Fo. 558; Roscoe's Admiralty Practice, p. 424.

²⁰ *Aberdeen Steam Trawling and Fishing Co., Ltd. v. Marine Navigation Co. of Canada, Ltd.*; *Flett v. Marine Navigation Co. of Canada, Ltd.*, 1922 S.L.T. 394.

²¹ *The Orizaba*, 1899, Fo. 513; Roscoe's Admiralty Practice, p. 424.

²² *The "Latin"*, 1895, Fos. 420, 429; Roscoe's Admiralty Practice, pp. 423-4.

CHAPTER III.

ARRESTMENT.

Nature of Arrestment of a Ship.—In many respects the arrestment of a ship in security or in execution presents special features, and it has been pointed out that it is “more of the “character of a poinding than of an arrestment.”¹

No Arrestee.—Thus in the case of a ship there is no arrestee, the ship being arrested in the hands of the debtor himself. It has been observed that “in the ordinary case of the arrestment of a ship within the jurisdiction—it may be in a harbour afloat—there is no arrestee. The ship is simply arrested “by description for a debt of the owners, and this particular “form of arrestment was, I think, originally confined to the “Admiralty Courts, who exercised jurisdiction *in rem*.”²

Vessel Fixed in Place of Arrestment.—Unlike the arrestment of a corporeal moveable, which does not deny to the arrestee the use of the subject arrested, provided always that he does not part with it, “the effect of an Admiralty arrestment, as the term ‘arrest’ itself implies, is to fix the vessel “in the place in which she is found, and, if there is any danger “of her being removed from that place, the power to dismantle may be exercised.”³ It is obvious that, as a ship is constantly passing out of one jurisdiction into another, the essential purpose of the arrestment would be defeated were the rule otherwise. In this way “the arrestment of a ship “operates as an interdict against the debtor himself and “paralyses him in the use of the property in his own possession.”⁴

Arrestment Operates as Real Diligence.—The arrestment of a ship operates not only as a personal diligence against the owner, but also as a real diligence against the ship itself, since

¹ *Anderson, Child & Co. v. Pott & M'Millan*, 1825, 3 S. 498, Lord Alloway, at 500.

² *Barclay, Curle & Co., Ltd. v. Sir James Laing & Sons, Ltd.*, 1908 S.C. 82, Lord M'Laren, at 89.

³ *Carlberg v. Borjesson*, 1877, 5 R. 188, Lord Shand, at 195.

⁴ *Wolthecker v. Northern Agricultural Society*, 1862, 1 M. 211, Lord Benholme, at 213.

the vessel is generally burdened with a variety of interests, such as those of charterers, mortgagees, holders of maritime liens, and others, which may enter into competition with that of the owner and may all be affected by the arrestment.⁵

Completion of Diligence.—The diligence is not completed as at common law by an action of furthcoming, but by a process of sale in which all parties interested in the ship are entitled to appear and enter claims, and in which the ship is sold under warrant of the Court and the proceeds transferred to the pursuer in satisfaction of his debt after all prior claims have been met. At common law an action of furthcoming cannot be raised until the debt has already been constituted; in a process of sale, however, the processes of constitution and of sale may be combined and a preliminary conclusion for constitution of the debt inserted in the crave for sale.⁶ A ship may be arrested for the debt of a part owner, but will invariably be released on security being found by his co-owners to the extent of his interest.⁷ It may be arrested for a debt of the master, not being an owner, when the obligation is in the form of a bottomry bond granted on the personal authority of the master.⁸

Poining of a Ship.—The poining of a ship is in general incompetent under the common law.⁹ No reason has been assigned for the rule, and the decision on which it is based has not been reported. It is thought, however, that it is due to the nature of the diligence itself. Poining confers a merely personal title to property, which in the case of a ship is of little value. A proper title can only be acquired by a process of sale which is enforced against all and sundry, and, being a proceeding *in rem*, receives extraterritorial recognition. By statute, however, poining has now been made competent in cases where the master or owner of the vessel has failed to carry out an order to pay "seamen's wages, fines, or other sums of money" due under the Merchant Shipping Act, 1894,¹⁰ or "fines" under the Oil in Navigable Waters Act, 1922.¹¹ No case of procedure under these statutes appears to have been reported.

⁵ *Clan Line Steamers, Ltd. v. "Earl of Douglas" S.S. Co., Ltd.*, 1913 S.C. 967.

⁶ *Taylor v. Williamson*, 1831, 9 S. 265.

⁷ *Macaulay v. Gault*, F.C. 6th Mar., 1821; *Malcolm v. Cook*, 1853, 16 D. 262.

⁸ *Lucovich, Petr.*, 1885, 12 R. 1090.

⁹ Bankton, Inst., 4, 41, 9.

¹⁰ 57 & 58 Vict. c. 60, sec. 693.

¹¹ 12 & 13 Geo. V. c. 39, sec. 7 (3).

Former Procedure.—The arrestment of a ship is in origin an Admiralty process, and as such is still subject to special rules of procedure. Formerly in the Court of Admiralty a ship might be arrested on a blank precept issued by the Judge Admiral, which proceeded on short copies of citation and without *induciae*, the completion of the libel being postponed until after execution of the arrestment. Procedure in this summary form was found to be necessary owing to the opportunities which shipowners possessed for escaping diligence by merely sending their vessels to sea on receipt of notice that proceedings were contemplated.¹² The ship might also be competently arrested in a common law form on a warrant proceeding from the Court of Session, but in such cases the concurrence of the Judge Admiral was necessary, since the vessel was situated within his jurisdiction and since, as has been pointed out, “the general warrant from this Court never could affect “anything on the sea. It was the Admiral’s concurrence “which formed the warrant.”¹³

Procedure now in Force.—By the Court of Session Act, 1830,¹⁴ the Court of Admiralty was formally abolished and its civil jurisdiction transferred to the Court of Session and the Sheriff Courts. Accordingly, these Courts now possess all the powers formerly exercised by the Judge Admiral,¹⁵ and therefore no concurrence in arrestment is now required. The Act expressly provided that the “using of arrestment hereinbefore observed in the High Court of “Admiralty and all regulations relative thereto may “be enforced in the foresaid Courts respectively.”¹⁶ Accordingly, a ship may now be arrested on a warrant issued by the Court of Session or the Sheriff Court in virtue of their dual jurisdiction in Admiralty and at common law.

(a) Arrestment in Common Law Form.—In an action in the Court of Session the warrant of arrestment contained in the summons of a common law action is as good authority for the execution of the arrestment of a ship as it is for that of any

¹² Smith’s Maritime Practice, p. 13.

¹³ *Mackenzie v. Campbell*, 1829, 7 S. 899, Lord Cringletie, at 900.

¹⁴ 1 Will. IV. c. 69, secs. 21-29.

¹⁵ *English’s Coasting and Shipping Co., Ltd. v. British Finance Co., Ltd.*, 1886, 14 R. 220, Lord Ordinary, at 223.

¹⁶ Sec. 23.

other goods and debts of the defender, notwithstanding that the vessel, unlike the other goods of the debtor, is arrested in the hands of the debtor himself and not in those of an arrestee.¹⁷ Where, however, it is desired to arrest ships or other maritime subjects, it is still a general practice to mention them specifically in the warrant.¹⁸ In the Sheriff Court the rules are similar. It is competent to arrest a ship in a small debt action,¹⁹ either in security or in execution. It has, however, been doubted whether an action for warrant to sell a ship can be brought within the small debt jurisdiction of the Court.²⁰ The arrestment, however, of a ship in a small debt action is always liable to be recalled as oppressive. It is doubtful whether the warrant of arrestment in a summons confers any authority to dismantle the vessel, and where this is desired the invariable practice is to apply to the Bill Chamber for a special warrant to dismantle. This is obtained by presenting the signed summons containing the warrant to arrest to the clerk or to the assistant clerk of the bills, who writes thereon the words, "The Lords grant warrant to dismantle arrested vessels, the same being in safe harbour." The signature of the Lord Ordinary is unnecessary.²¹ The warrant is granted by the Lord Ordinary on the Bills as exercising the summary jurisdiction of the Court of Session in maritime causes. In the Sheriff Court application is made to the Sheriff. Authority to dismantle, however, need only be obtained in the case of warrants to arrest on the dependence. A final decree is in itself sufficient authority to dismantle.²²

(b) *Arrestment in rem.*—Where for any reason arrestment in the above manner is incompetent or inappropriate, and the ends of justice are for that reason liable to be defeated, the ship may be arrested *in rem* in Admiralty. Thus arrestment in this form may be used to enforce a maritime lien or other real right in the ship. In such a case arrestment of the ship on the dependence of a personal action against the owner is an inappropriate form of diligence, since the nature of a maritime lien is such that it

¹⁷ *Clark v. Loos*, 1853, 15 D. 750.

¹⁸ *Jur. Styles* iii., 301.

¹⁹ *Goodwin & Hogarth v. Penfield*, 1871, 10 M. 214.

²⁰ *H. M. Advocate v. Murray*, 1925 S.L.T. (Sh.Ct.) 6.

²¹ *Codifying Act of Sederunt*, E. iii., 3.

²² *English's Coasting and Shipping Co., Ltd. v. British Finance Co., Ltd.*, 1886, 14 R. 220, Lord Ordinary, at 224; see also *infra*, p. 68.

requires to be enforced against all and sundry and not merely against the owner of the ship. "The working out of the maritime lien must be by effectuating a sale of the ship as a real diligence against all and sundry, and not merely against the person who is called in the petitory part of this action and asked to submit to a decree. If it is a good lien the ship can be sold, and it does not matter to whom the ship belongs. Now, if that is so, it seems to me to make an arrestment on the dependence an inappropriate form of diligence, because you are not there working out your payment out of the property of the debtor; you are dealing with the ship itself, which is supposed, so to speak, to be the living agent of the wrong that has been done to you. . . . I think that, if we could not keep the ship in order to make good the maritime lien, it would be very little use having a maritime lien in our law at all, and, therefore, I have no doubt that there may be a good arrestment put upon the ship in order to prevent the ship going away and, so to speak, withdrawing herself from the process of sale which is directed against her in respect of the maritime lien."²³ A warrant to arrest *in rem* has also been granted in the following cases:—(a) In proceedings to enforce a bond of bottomry granted by the master of a ship on his own authority. Liability under the bond in such a case is personal to the master, and the owner, therefore, incurs no personal liability. Accordingly, no action on the bond can be brought against the owner, and the master having no property in the ship, she is not arrestable on the dependence of an action against him. In such a case, therefore, since the ship was herself the security of the debt and was on the point of leaving the jurisdiction, an arrestment *in rem* has been authorised²⁴; (b) in proceedings to enforce a promissory note granted by the master for his disbursements, the note bearing to pledge the security of ship and freight and the master's lien over the same²⁵; (c) in proceedings against a vessel laid up in a Scottish anchorage without either master or crew, whose owners are unknown and regarding whom no information could be obtained.¹ The warrant is obtained on petition addressed to the Lord Ordinary on the Bills. The warrant for

²³ *Clan Line Steamers, Ltd. v. "Earl of Douglas" S.S. Co., Ltd.*, 1913 S.C. 967, Lord President, at 973.

²⁴ *Lucovich, Petr.*, 1885, 12 R. 1090.

²⁵ *M'Connachie, Petr.*, 1914 S.C. 853.

¹ *The "Dorie" S.S. Co., Ltd., Petr.*, 1923 S.C. 593 (reported on another point).

execution is the exhibition by a messenger-at-arms of a certified copy of the interlocutor of the Lord Ordinary, and its execution is required to be reported to him within twenty-four hours. Being pronounced in the Bill Chamber, the interlocutor contains no order for intimation on the walls or in the minute book.² Although it has never been expressly so held, similar procedure appears to be competent when it is desired to enforce real rights in the cargo. In the Sheriff Court arrestment *in rem*, being purely an Admiralty process, the warrant may be granted by the Sheriff, in virtue of his Admiralty jurisdiction, in which case the same procedure is followed, with the necessary modifications.

Subjects Included in Arrestment.—The arrestment of a ship, unless so expressed, does not include the cargo, but includes, in addition to the direct “constituents” of the vessel herself, such “accompaniments” as are essential to her in her occupation. It has been pointed out that “those accompaniments which are essential to a ship in its present occupation “not being cargo, but totally different from cargo, though they “are not direct constituents of the ship (if, indeed, they were “they would not be appurtenances, for the very nature of an “appurtenance is that it is one thing which belongs to another “thing), yet if they are indispensable instruments without “which the ship cannot execute its mission and perform its “functions, it may, in ordinary loose application, be included “under the term ‘ship,’ being that which may be essential to “it—as essential to it as any part of its own immediate “machinery.”³ It is not necessary that such accompaniments should be exclusively appropriated to the particular vessel arrested, but may be such as are transferable from one vessel to another, provided that they are understood at the moment to belong to the ship. Thus, it has been held that a sale by missive of a vessel “with all belonging to her on board and on “shore” included the chronometer which was at the moment in the hands of an optician for the purpose of regulation.⁴

Form of Warrant.—A warrant of arrestment should therefore be in sufficiently wide terms to include such accompaniments, as well as the direct constituents, of the vessel. In its

² For form of petition and interlocutor of the Lord Ordinary on the Bills, see App., p. 381.

³ The “*Dundee*,” 1823, 1 Hagg. Adm. 109, Lord Stowell, at 122.

⁴ *Armstrong & Co. v. M'Gregor & Co.*, 1875, 2 R. 339.

usual form the warrant used on the dependence of a summons includes "all and sundry ships and shares of ships, barques, "boats, goods, gear, debts, and effects" belonging to the debtor.⁵ A warrant to arrest *in rem* may be expressed to include the ship, "her hull, keel, engine, spars, sails, and stores, "with her float boats, furniture, and apparelling."⁶ The warrant in a summons of sale may be expressed to include the ship, "and her boats, furniture, apparelling, and appurtenances."⁷ The term "appurtenances" has a wider meaning than "furniture." Some articles are universally regarded as appurtenances, whereas others are only appurtenances by usage in respect of the particular occupation in which the vessel is at the time engaged.⁸ It may be noted that the term "appurtenance" is used in the statutory form of mortgage of a ship provided by the Merchant Shipping Act, 1894.⁹ In order to make a thing an appurtenance it must at the time be specifically appropriated to the ship. Thus nets used indiscriminately on board several fishing vessels are not appurtenances.¹⁰ It may be noted that the warrant of arrestment on the dependence of a summons will only arrest such accompaniments of the vessel as are actually the property of the debtor, whereas the warrant *in rem* arrests the vessel herself and all her accompaniments. The distinction may be of importance if a question arises whether a particular article of the vessel is the property of the debtor or of a third party. The arrestment does not attach the personal property of the master and crew nor the personal effects of the passengers.¹¹

Vessels Exempt from Arrestment.—Certain vessels are exempt from arrestment. Vessels belonging to or requisitioned by the Government cannot be arrested,¹² and a similar exemption applies to vessels belonging to any foreign independent State, even although the vessel be employed in trade.¹³ Such vessels are immune from arrest even in cases where they are subject to the ordinary jurisdiction of their

⁵ Jur. Styles iii., 301.

⁶ *M'Connachie, Petr.*, 1914 S.C. 853.

⁷ Jur. Styles iii., 181.

⁸ *The "Dundee,"* 1823, 1 Hagg. Adm. 109.

⁹ 57 & 58 Vict. c. 60, First Schedule, Part I., Form B.

¹⁰ *In re Salmon, ex parte Gould*, 1885, 2 Mor. Bky. Cas. 137.

¹¹ *The "Willem III.,"* 1871, 3 Adm. & Ec. 487.

¹² *The "Broadmayne,"* 1916, P. 64.

¹³ *The "Porto Alexander,"* 1920, P. 30.

own Courts, unless the Government of the State has expressly waived their immunity.¹⁴ Mail ships may be exempted from arrestment if security is given for the payment of any damage for which they may be found liable.¹⁵

Arrestment of Share.—A share of a ship may be arrested and decree obtained for making furthcoming the price and profits of the vessel in virtue of the arrestment. Where a share had been transferred to the master of the vessel under a back-bond, it was held that it might be arrested in his hands.¹⁶

Arrestment of Freight.—The arrestment of a ship does not attach the freight, which does not necessarily follow the ship nor belong to its owners, and it requires to be arrested independently.¹⁷ It is not now customary to arrest freight *eo nomine*, but it is arrested merely as a sum of money due at common law in ordinary form.¹⁸ If necessary, a judicial reference may be made to persons of skill to determine the amount of freight due.¹⁹ If a cautioner undertakes to make freight furthcoming, the sum bears interest from the date of the obligation.²⁰ Freight due from sub-charterers to charterers cannot be arrested for a debt of the owners of the ship unless the owners have a direct right of action for it against the sub-charterers.²¹

Arrestment of Cargo.—Except where arrestment *in rem* is used, there is no distinction in principle between the arrestment of goods at sea and on land. The arrestment of a ship does not necessarily arrest her cargo and imposes no *nexus* on the cargo except in so far as practical difficulty may be experienced in discharging it from the arrested vessel. Formerly the arrestment of cargo was an Admiralty process, for which the concurrence of the Judge Admiral was necessary,²² but since the abolition of the Admiralty Court this distinction between arrestments of goods at sea and on land no longer holds. Cargo aboard ship is generally

¹⁴ *The "Victoria" v. The "Quillwark,"* 1922 S.L.T. 68.

¹⁵ Mail Ships Act, 1891 (54 & 55 Vict. c. 31); Mail Ships Act, 1902 (2 Edw. VII. c. 36).

¹⁶ *Monteith v. Murray*, 1677, M. 3685.

¹⁷ *The "Nordsoen" v. Mackie, Koth & Co.*, 1911 S.C. 172.

¹⁸ *Ranking & Co. v. Tod*, 1870, 8 M. 914.

¹⁹ *Anderson, Child & Child v. Pott & M'Millan*, 1834, 12 S. 301.

²⁰ *Anderson, Child & Child v. Pott & M'Millan*, *supra*.

²¹ *Mitchell v. Burn*, 1874, 1 R. 900.

²² Bankton, Inst., 4, 12, 9.

arrested in the hands of the master,²³ but arrestment in his hands is only competent if the goods are actually aboard and in his charge and the bill of lading has been delivered by him, and opinion has been reserved regarding the effect if the bill of lading has been endorsed away.²⁴ In one instance, however, goods aboard ship appear to have been arrested in the hands of the manager of the shipping company.²⁵ The arrestment is effectual to create a preference over the goods, even if they are carried in the ship out of the jurisdiction.²⁶ It has been stated that if the vessel has already sailed before the arrestment can be executed, the arrestment may be edictal,¹ but in practice edictal arrestment is now unknown. It has been held that the interests of a partner in a copartnery may be arrested notwithstanding that the subjects of the copartnery are at sea or abroad at the date of the arrestment, and in the custody of the super-cargo or agent of the copartners, provided always that they have afterwards been made good to the copartnery. In such a case arrestment may be in the hands of the copartners, and also edictal.² If goods are arrested at sea for a debt of their owner, it is in the interest of all parties that the master should carry them back to this country to enable the right to them to be judicially determined. For this service the shipowner is entitled to return freight based on a right of recompense.³ If the goods have been delivered to the shipowner, but have not yet been placed on board, arrestment takes place in his hands or in those of his agents. This is contrary to the common law rule that arrestment in the hands of an agent is incompetent, but is sanctioned owing to the peculiar position and exceptional powers of ship's husbands. Thus, arrestment has been allowed in the hands of shipbrokers on the ground that they were not merely agents but also factors or commissioners for the owners of the vessel.⁴ Where consignees of cargo imported on a ship under bottomry had endorsed the bill of lading to purchasers of the cargo under a stipulation that the price should include freight, and the purchasers had retained part of the price to meet a balance of the freight due, and a creditor of

²³ *Kellas v. Brown*, 1856, 18 D. 1089.

²⁴ *M'Donald v. Wingate*, 1825, 3 S. 344.

²⁵ *Matthew v. Fawnes*, 1842, 4 D. 1242 (S.P.).

²⁶ Bell, *Comm. on Statutes*, p. 16.

¹ Bankton, *Inst.*, 4, 12, 9.

² *Rae v. Neilson*, 1742, M. 716.

³ *The "Mossiel" S.S. Co., Ltd. v. Stewart*, 1900 Sh.Ct.Rep. 289.

⁴ *Carron Co. v. Currie & Co.*, 1896, 33 S.L.R. 578.

the owner and master had arrested the cargo in the hands of the purchasers, it has been held in an action of furthcoming (1) that the arrestees were accountable for so much of the freight as remained in their hands at the date of the arrestment without deducting the contents of the bottomry bond to which they had not acquired right till after the date of the arrestments, and (2) that the arrestments attached the amount due to the ship for general average, this being a claim which only arose when the vessel reached the port of delivery, and one in which the arrestees, as then owners of the cargo, were the sole debtors, notwithstanding their arrangement with the sellers.⁵

Arrestment of Incompleted Ship.—A vessel in course of construction in a shipyard may competently be arrested as a maritime subject, provided that it has acquired the identity of a ship.⁶ With reference to such an arrestment two questions may arise for determination, firstly, whether the vessel has so far acquired the identity of a ship as to render it arrestable as a maritime subject; and, secondly, assuming that it can be so identified as a maritime subject, whether the true owner at the moment of the arrestment of the vessel is the purchaser or the shipwright. The former question is entirely one of fact regarding which there have been no decisions, but it is thought that identification takes place as soon as the keel is laid and the vessel occupies a berth in the shipwright's yard. An instalment of the price is frequently made payable at this period, and it may be observed that for the purposes of the Merchant Shipping (Convention) Act, 1914,⁷ this period is taken to be the commencement of the construction of the vessel.

The question whether an incompleted ship is the property of the shipwright or of the purchaser at the date of the arrestment is one which is frequently difficult to determine. The contract of shipbuilding is one for the sale of goods under the Sale of Goods Act, 1893,⁸ and, accordingly, the passing of property is a question of intention as expressed in the contract.⁹ The contract of shipbuilding is, however, one of a special character, in which the intention of parties is not always ap-

⁵ *Ranking & Co. v. Tod*, 1870, 8 M. 914.

⁶ *Balfour v. Stein*, F.C. 7th June, 1808; *Mill v. Hoar*, F.C. 18th Dec., 1812.

⁷ 4 & 5 Geo. V. c. 50, sec. 28.

⁸ 56 & 57 Vict. c. 71.

⁹ *Barclay, Curle & Co., Ltd. v. Sir James Laing & Sons, Ltd.*, 1908 S.C. 82; H.L. 1.

parent. The price is commonly payable in instalments, and frequently it is the intention of parties that the vessel should become the property of the purchaser, so far as completed, as each instalment is paid, and subsequent work is done by the shipwright on a ship which is really the property of the purchaser and not his own. In such a case the shipwright is probably in the position of a custodier or bailee for the purchaser.¹⁰ Delivery of the property is in this case constructive, and this arrangement may be in the interest of both parties, since the payment of the instalments covers the shipwright's initial outlay on material, while the passing of property protects the purchaser against the possible insolvency of the shipwright. Where, however, the purchaser is assured of the financial stability of the shipwright, it may be in his interest to postpone the passing of property until the conclusion of acceptance trials, in order that he may retain the right of rejection if the vessel is not conform to contract. It has been pointed out, however, that the contract is primarily one for the sale of a completed ship, and that *prima facie* the property remains with the shipwright until the vessel is completed. If the contrary is intended, as is perfectly competent, it should be clearly expressed.¹¹ Actual delivery is usually postponed till the conclusion of the acceptance trials, at which date the builder's certificate, which is necessary for registration of the vessel and its navigation as a British vessel, is handed over to the purchaser and the vessel transferred to his servants. Until this date the vessel may be regarded as incomplete, and, in the absence of any contrary expression of intention, property may then be said to pass.¹² Registration, however, in the purchaser's name is not conclusive evidence of delivery, nor the payment of an extra insurance premium by him.¹³ Constructive delivery may be evidenced by payment of the final instalment of the price.¹⁴

Execution of Arrestment.—Arrestment is executed by attaching the schedule of arrestment to the main or only mast

¹⁰ Bell, Prin., sec. 1303.

¹¹ *Barclay, Curle & Co., Ltd. v. Sir James Laing & Sons, Ltd.*, *supra*, Lord President, at 89.

¹² Bell, Prin., sec. 1328.

¹³ *Henckell Du Buisson & Co. v. Swan & Co.*, 1889, 17 R. 252.

¹⁴ Cf. *Brewer & Co. v. Duncan & Co.*, 1892, 20 R. 230; *Reid v. Macbeth & Gray*, 1904, 6 F. (H.L.) 25; *Seath & Co. v. Moore*, 1886, 13 R. (H.L.) 57.

and chalking above it the Royal initials.¹⁵ Where there is no mast, or the ship is still in the course of construction, the schedule is attached to the stern post.¹⁶ Owing to the risk of injury to life and property, and on other grounds, the warrant can only be executed in a harbour or other safe place. The reasons for the rule have been thus stated—"I think it is most
 "undesirable to extend the use of the diligence of arrestment
 "of ships to any case except that of a vessel in harbour or at
 "anchor in a roadstead, and in particular to extend its use
 "to the case of a vessel actually sailing on her voyage. If
 "such a proceeding were sustained, a number of subordinate
 "questions of difficulty might arise, *e.g.*, is the messenger
 "entitled to choose the port to which he will take the vessel?—
 "in this case was he entitled to take the vessel to Lamlash
 "Bay or Rothesay?—or to the nearest anchorage, or to Glasgow, which was the port from which she had sailed, and, if
 "an accident happened in the navigation, as a collision or
 "damage from storm, whether is the shipowner or the person
 "using the diligence to bear the consequences? Such considerations go strongly to show that the proceeding is quite
 "illegal. Holding, as I do, that this was a seizure and capture, and not the due execution of the diligence of arrestment, I think that the arrestments should be recalled as incompetently used, and therefore without caution."¹⁷
 Opinion has been reserved whether notice of the issue of the warrant of arrestment can be served at sea.¹⁸

The warrant expressly bears that the arrestment shall be executed "in a safe harbour." This expression, however, is not to be construed literally, but is applicable to any recognised anchorage in which the arrestment can be executed with reasonable safety. A harbour has been defined as "a place suitable for landing and embarking and conveniently situated with reference to the requirements of the district."¹⁹ Thus, an arrestment may be executed in an open roadstead if such is at the time reasonably safe, whereas the circumstances may be such as to render an actual harbour in fact an unsafe place.²⁰ The limit of a roadstead is in each case a question of circumstance depending

¹⁵ Bell, *Comm. on Statutes*, p. 16.

¹⁶ *Balfour v. Stein*, F.C. 7th June, 1808.

¹⁷ *Carlberg v. Borjesson*, 1877, 5 R. 188, Lord Shand, at 195.

¹⁸ *Borjesson v. Carlberg*, 1878, 5 R. (H.L.) 215, Lord Cairns, L.C., at 216.

¹⁹ *Macpherson v. Mackenzie*, 1881, 8 R. 706, Lord Young, at 718.

²⁰ *Petersen v. M'Lean*, 1868, 6 M. 218.

on conditions of wind and weather and the draught of the vessel. Sailing ships require more sea-room than power-driven vessels, and habitually anchor at a greater distance from land. It should be observed, moreover, that roadsteads are of two kinds, those which are associated with a port, *e.g.*, Leith Roads, and those which are not, *e.g.*, The Downs. In the former case it may be assumed that a vessel anchoring there intends to make use of the port, but in the latter she may be there merely owing to stress of weather, and so, if a foreign vessel, may be entitled by international law to the right of innocent passage.²¹ In such a roadstead it is probable that execution of arrestment is incompetent. The expression "port" is of wider meaning than "harbour." A roadstead may be within the limits of a port, *e.g.*, the Tail of the Bank, although not within those of a harbour.²²

Illegal Execution.—Since the effect of the arrestment is to fix the ship in the place where she is situated, it is a legal wrong, for which the arrester may be liable in damages, to remove her in the course of the execution of the arrestment from the place where she is situated, and the offence may be aggravated if the removal takes place before the formal execution of the arrestment.²³ If damage from stress of weather is anticipated, a warrant for the removal of the vessel to a safer berth may be obtained. Similarly, it is a legal wrong to execute an arrestment at sea, even where the ship has herself set sail illegally as in breach of a previous arrestment. In such a case, provided the ship be still within the jurisdiction, a warrant may be obtained from the Court of Session or from the Sheriff Court to seize the vessel and bring her back.²⁴ An arrestment executed illegally is not only void in itself, but it cannot become the basis of any subsequent right over the ship on the part of those who either effected it or were parties to it. Thus, not only the granter of a mandate which authorised the arrestment, but also the mandatory and other parties who granted authority to the mandant to act for them, have all been held debarred from executing a subsequent arrestment on the ship at the port to which it had been taken as the result of the illegal arrestment. This disability, however, does not attach to an innocent third party who arrests the

²¹ Cf. *The "Neutralitet,"* 1805, 6 C. Rob. 30, Sir Wm. Scott, at 34.

²² *Hunter v. Northern Marine Insurance Co., Ltd.*, 1888, 15 R. (H.L.) 72.

²³ *Petersen v. M'Lean*, 1868, 6 M. 218.

²⁴ *Carlberg v. Borjesson*, 1877, 5 R. 188, Lord Shand, at 195.

vessel.²⁵ These rules do not apply to wrecks, which may be arrested wherever situated within the jurisdiction. Whether or not they may be arrested in the hands of the Receiver of Wrecks does not appear to have been determined.

Dismantling.—Where there is reason to believe that the arrestment will be broken, the vessel may be dismantled. Authority to execute dismantling may be obtained from the Lord Ordinary on the Bills or in the Sheriff Court from the Sheriff within whose jurisdiction the vessel is situated. If there is reason to believe that the dismantling will expose the vessel to danger from stress of weather or otherwise, a warrant may be obtained to remove her to a safer berth before execution of the diligence.¹ From the nature of the case it is obvious that it may frequently be practicable to execute arrestment in circumstances where the further process of dismantling by disabling the vessel might lead to her loss or damage through driving ashore or fouling another ship. The opinion has been expressed that a warrant of arrestment is in itself sufficient authority to dismantle a vessel, since dismantling is simply completing an arrestment and making it efficient. Such an authority, however, if rashly exercised, might have serious consequences, and in practice a special warrant is invariably obtained. A final decree is, however, in itself sufficient authority to dismantle.² In the case of a sailing ship dismantling is effected by removal of the sails and rudder, and in the case of a power-driven vessel by removal of a necessary part of the machinery. If the diligence is improperly executed, as by removal of the machinery of the pump, the messenger-at-arms and his cautioners may be liable in damages.³ In practice the execution of dismantling, which may be a difficult and expensive operation, is seldom found to be necessary. It is the duty of the officer of customs, on exhibition to him of the warrant of arrestment, to withhold her clearance, without which she is unable to sail, and her detention is thus in effect secured without the necessity of dismantling.

Wrongful Arrestment.—In Scotland it is a legal wrong to use diligence against a person's estate without legal warrant,

²⁵ *Carlberg v. Borjesson*, 1877, 5 R. 390; H.L. 21.

¹ *Turner v. Galway*, 1882, 19 S.L.R. 892, Lord Shand, at 893.

² *English's Coasting and Shipping Co., Ltd. v. British Finance Co., Ltd.*, 1886, 14 R. 220, Lord Ordinary, at 223.

³ *Kennedy v. M'Kinnon*, 1825, 1 S. 210; see also *supra*, p. 58.

and, accordingly, if a vessel is arrested for a debt which is not that of the owner, the arrester may be liable in damages, and if the damages are assessed by a jury it is unnecessary to aver malice in the issue.⁴ Similarly, if a ship is arrested as the property of a person who in fact has no interest in it, the owner is entitled to damages for its detention.⁵ Even if the arrester has legal warrant for his arrestment, he may be liable in damages if it is exercised nimiously and oppressively, as where a vessel has been detained for a year in an action which ultimately proves to be unfounded. In this case, however, if the case goes to jury trial, malice and want of probable cause require to be put in issue, and the objection that an averment of malice and want of probable cause is unnecessary on the ground that the arrestment of a ship is an obvious wrong, which amounts to interdict of her use against the owner and paralyses him in her employment, has been repelled.⁶ In England the principles applicable are somewhat different, since there no claim for damages for wrongful arrestment arises in the absence of *mala fides* or gross negligence. Thus, in England it has been held that there is no claim for damages where a ship is arrested on a claim for salvage in circumstances where towage services have alone been rendered,⁷ or where the wrong vessel has been arrested in error in an action for damages for collision.⁸

Breach of Arrestment.—Breach of arrestment of a ship, although it is sufficient to found a claim for damages, is a less serious offence than breach of an interdict against her removal, and does not necessarily amount to contempt of Court. Accordingly, in a case where the owner of a vessel, under the mistaken impression that the arrester had agreed to her removal, had removed an arrested ship to another berth in order to complete the loading of her cargo, it has been held that, although there has been breach of arrestment in the strict letter of the law, there has been no such offence as to infer contempt of court. It was observed that, an arrestment “being obtained “entirely at the instance of the party without convening “his opponent in any way, it is every day a matter which is “the subject of arrangement between the parties how far it

⁴ *Meikle v. Sneddon*, 1862, 24 D. 720.

⁵ *Gray v. Farquhar*, 1823, 2 S. 160.

⁶ *Wolthecker v. Northern Agricultural Co.*, 1862, 1 M. 211.

⁷ *The “Strathnaver,”* 1875, 1 App.Cas. 58.

⁸ *The “Evangelismos,”* 1858, 12 Moo. P.C.C. 352.

“is to be insisted in and how far it is to be relaxed.”⁹ Where, however, in the absence of such arrangement, an owner has removed his vessel in breach of arrestment, he will only be allowed to defend the action on finding caution for or making consignment of the amount of the sum secured by the arrestment.¹⁰ If he desires authority to remove his vessel after an arrestment has been laid on, application may be made to the judge who granted the warrant of arrestment, or in vacation to the Lord Ordinary on the Bills, or in the Sheriff Court to the Sheriff of the county within whose jurisdiction the vessel is situated.¹¹

General Principles Applicable to the Release of Ships from Arrestment.—In considering applications for the release of ships, the Court is guided by special considerations. It is of importance that the vessel should be retained under arrestment for as short a period as possible. Ships are subjects of great commercial importance, and it is in the interest of the public that they should be constantly employed in trade. In themselves they are of considerable capital value, their cargoes are generally valuable and frequently perishable, and the claims for which they are arrested are of large amount which are of necessity frequently libelled at random, as in the case of claims for salvage or of cross actions for damage by collision, in which an accurate estimate of the true value of the claim can frequently only be made after proof has been led and the precise incidence of loss has been determined. Moreover, in the case of vessels owned abroad access to caution is frequently difficult. On the other hand, if the application is too readily granted the vessel may be removed from the jurisdiction either indefinitely or for a prolonged period, and more particularly if the owner is resident abroad, all security for the debt may thus be lost. These special features of the arrestment of ships have been the subject of frequent judicial comment. Thus it has been observed that “the case of a ship is a peculiar one. It is “peculiar as affects the nature of the property itself, and “peculiar also as regards the nature of the title to that property. It is peculiar as to the manner in which the arrest-

⁹ *Inglis & Bow v. Smith & Aikman*, 1867, 5 M. 320, Lord President M'Neill, at 323.

¹⁰ *Meron v. Umland*, 1896, 3 S.L.T. 286.

¹¹ *Turner v. Galway*, 1882, 19 S.L.R. 892.

"ments once laid on are to be followed up. Therefore it is
 "a case in which we are not to be led into the ordinary course
 "of *in dubio* requiring caution. We must see our way more
 "clearly in regard to the arrestment of a ship than in the
 "ordinary case of arrestment, and parties residing in the
 "Colonies at a distance from caution are more especially en-
 "titled to every consideration in a question of arrestment."¹²
 Similarly, it has been pointed out that "it must be
 "borne in mind that a warrant of arrestment is granted as a
 "matter of course on the mere application of an alleged creditor
 "who desires security for his debt—a state of the law which
 "has often been the subject of complaint in reference to vessels
 "of large burden with valuable cargoes suddenly detained when
 "on the point of sailing in security of claims which have ulti-
 "mately proved to have been unfounded."¹³ Similarly, Bell
 observes that "it is a very delicate matter, however, to arrest
 "a ship about to sail, especially when she is under affreight-
 "ment either specially or as a general ship," and he suggests
 that it is doubtful "whether such an arrestment can stop a
 "voyage on which the ship is under engagement to third
 "parties."¹⁴ The arrestment of a ship, moreover, differs
 materially both from that of a debt and from that of other
 goods. In the arrestment of a debt the arrestee cannot be
 compelled to pay the alleged debt until an action of forthcom-
 ing has been raised, and in the interval no embargo is laid on
 his general funds.¹⁵ In the arrestment of other goods, more-
 over, although the arrestee is unable to part with the subject
 arrested, no prohibition is laid on his continued use of it, and
 he is entitled to assert any interest which he may possess when
 an action of forthcoming is raised. In the case of a ship, how-
 ever, which is arrested in the hands of her owner, an immediate
 embargo is placed on her employment which, unless she is re-
 leased in the interval, continues until her sale by public roup
 under judicial warrant.

For these reasons, in considering applications for release,
 the Court will proceed on broad, equitable principles, security
 will be more readily modified or dispensed with than in the case
 of other subjects, and the ordinary rule of *in dubio* requiring

¹² *Duffus v. Mackay*, 1857, 19 D. 430, Lord President M'Neill, at 442.

¹³ *Carlberg v. Borjesson*, 1877, 5 R. 188, Lord Shand, at 195.

¹⁴ Bell, Comm. on Statutes, p. 16.

¹⁵ *Barclay, Curle & Co., Ltd. v. Sir James Laing & Sons, Ltd.*, 1908 S.C. 82, Lord President, at 87.

caution will not necessarily be followed.¹⁶ The general principles which will guide the Court have been thus summarised—"The rules of the Court as to taking bail have two objects—in view: one that the property arrested should be detained under the hand of the law as short a while as possible; the other that the plaintiff should not lose the real security of the ship until he has obtained the security of good and sufficient sureties. Both these objects are of great importance."¹⁷

Persons Entitled to Apply for Release.—Any person who can show an interest, such as an owner, part owner, charterer, or mortgagee, is entitled to apply for release of the ship. In the majority of cases application is made by the owner himself. *Prima facie* the right to apply belongs to the registered owner,¹⁸ but the presumption may be rebutted, and the person really entitled to apply is the true owner.¹⁹ A foreigner with a good formal title of ownership may apply.²⁰ A part owner may apply for the release of a ship arrested by the creditor of his co-owners. In such a case security to the extent of the debtor's interest in the ship may be required.²¹ A charterer is entitled to apply. It has been stated that "if a ship bound for a voyage and under charter party is arrested, the arrestment will be loosed upon caution to answer the suit on her return."²² The rule, however, is not absolute. It is probable that a ship will be released upon the application of the charterer if the vessel has been in fact demised to him and he is therefore in the position of owner, but in a case where the charterer of a ship, which had been arrested for the debt of the owner, petitioned for recall, the petition was refused on the ground that the charterer was not the true owner, and that the charter party could not free the vessel from the owner's liability to his creditors. In this case, however, no caution was offered, and it was indicated that the application might have been entertained if this had been done.²³ A mortgagee in possession is entitled to apply,²⁴

¹⁶ *Duffus v. Mackay*, 1857, 19 D. 430, Lord President, at 442.

¹⁷ *The "Corner"*, 1863, Br. & L. 161, Dr. Lushington, at 164.

¹⁸ *Duffus v. Mackay*, 1857, 19 D. 430.

¹⁹ *Bell v. Gow*, 1862, 1 M. 183.

²⁰ *Schultze v. Robinson & Niven*, 1861, 24 D. 120.

²¹ *Macaulay v. Gault*, F.C. 6th Mar., 1821.

²² Bankton, Inst., 4, 41, 9.

²³ *Thorburn v. De Wolff*, 1847, 10 D. 310.

²⁴ *Stewart v. Macbeth & Gray*, 1882, 10 R. 382.

and a mortgagee with power of sale would probably be held to have a similar right, even though not in possession. For obvious reasons, the release of the vessel will always be refused in cases where it would have the result of defeating the object of the action, as where the action is one concerning possession or co-ownership and there is the danger of the vessel being removed from the jurisdiction.

Procedure in Applications for Release: (1) Former Procedure.—In the Scottish Court of Admiralty the release of a ship from arrestment was essentially an informal proceeding. The arrestment might be loosed on a simple certificate being granted by the Clerk of Court that sufficient caution had been found.²⁵

(2) Procedure now Followed.—By the procedure now followed the arrestment of a ship may be recalled or restricted under the special provisions of the Personal Diligence (Scotland) Act, 1838¹; it may be recalled by the Court of Session; or it may be loosed by the Lord Ordinary on the Bills.

(a) Recall or Restriction under the Personal Diligence (Scotland) Act, 1838.—In the Personal Diligence (Scotland) Act, 1838,² no special provision is made for the case of ships, but in its application the general principles which distinguish the arrestment of ships from that of other property require to be observed.

(b) Recall by the Court of Session.—Procedure is by petition for recall in ordinary form, as in the case of other property. In the ordinary event petitions for the recall of arrestments are granted by the Court in exercise of its *nobile officium*, which is a common law power, and may be exercised in the recall of the arrestment of a ship in an ordinary action. In maritime causes, however, the Court possesses in addition an Admiralty jurisdiction, and it is therefore in exercise of this jurisdiction that the arrestment of a ship is recalled in a maritime cause. The distinction may be material in the event of recall being desired in vacation. In vacation in maritime causes the Lord Ordinary on the Bills has an express jurisdiction to grant “all” applications of a summary nature connected with such

²⁵ *Thomson v. Bousie*, 1836, 14 S. 227, Smith's Maritime Practice, p. 63.

¹ 1 & 2 Vict. c. 114, secs. 20-21.

² *Supra*.

“causes.”³ It is probable, although it does not appear to have ever been expressly so held, that in vacation, in virtue of this jurisdiction, the Lord Ordinary has power to recall the arrestment of a ship, provided that the cause is a maritime one. If, however, the cause is not maritime, the *nobile officium* requires to be appealed to, which can only be exercised by the Lord Ordinary in vacation in certain cases of urgency,⁴ or on a special remit from the Court. Accordingly, where the release of a ship from arrestment is desired in vacation, and it is uncertain whether the cause will be regarded as maritime, it is preferable *ob majorem cautelam* to proceed by a bill for letters of loosing.⁵

(c) **Loosing by the Lord Ordinary on the Bills.**—The arrestment of a ship may be loosed by the Lord Ordinary on the Bills at all times, either in session or in vacation. Procedure is by a bill for letters of loosing in ordinary form. It has been pointed out that, unlike the recall of an arrestment, “the loosing of arrestment is not a discharge or extinction of the creditor’s diligence, but seems to be only in the nature of a licence to receive the goods or money notwithstanding the arrestment,” and that accordingly the arrestment retains its priority in a competition.⁶ Procedure by a bill for letters of loosing is therefore generally appropriate in cases where it is not desired to extinguish the diligence entirely, but merely to suspend its execution temporarily, as for the purpose of enabling the vessel to carry out a contract of affreightment whose successful conclusion may be in the interests of all parties, including that of the arrestor. In such cases the ship may be released under a bond of caution for her safe return on the completion of the affreightment, to be again made forthcoming to the diligence of the arrestor. By this means it is possible to postpone completion of the diligence to a more convenient date. The arrestor thus retains the security of the ship herself in the event of her safe return within the jurisdiction, and acquires also the personal security of the cautioner for her value in the event of her being lost at sea or sold abroad. It has been held that it is competent to reclaim against an interlocutor allowing a bill for letters of loosing notwithstanding that at the date of

³ Court of Session Act, 1830 (1 Will. IV. c. 69), sec. 21.

⁴ *Greigs Petr.*, 1866, 4 M. 1103; *Buchanans Petr.*, 1910 S.C. 685.

⁵ *Olydesdale Bank, Petr.* (Bill Chamber, 22nd April, 1924, not reported).

⁶ Bell, Comm. ii., 70.

the reclaiming note the vessel has already sailed, and that, therefore, a remedy under the reclaiming note is impossible owing to the withdrawal of the subject arrested from the jurisdiction of the Court.⁷

Nature of an Obligation in Security for the Release of a Ship.—The obligation in security on which a ship is released from arrestment is not necessarily similar to a bond of caution in ordinary form for payment of a debt. A bond of caution may, indeed, be granted in ordinary form, but such a bond is merely in security for the personal liability of the debtor, and does not apply to debts which attach *ex lege* to the ship herself. Unless, therefore, the surety expressly accepts liability for such debts, they cannot be enforced against the sum found in security, but only against the ship herself in a process of sale in which competing claims may be lodged. Accordingly if the arrestor's claim is founded on a maritime lien or other real right in the ship, the obligation of the surety in order to be effectual should be so expressed as to cover claims which attach to the ship herself. In this case his obligation is not merely personal to the arrestor for his debt but real to the Court to implement the decree *in rem* which might have otherwise been made if security had not been found and it had been necessary to hold a process of sale. When it is desired to give a security of this nature it may be expressed to be a *surrogatum* for the ship in so far as the arrestor may establish claims against her. In this event the surety may himself rank on the sum found in security in competition with the arrestor⁸ or other claimants.

Amount of Security.—In fixing the amount of the security in which a vessel might be released from arrestment the Scottish Court of Admiralty proceeded on the principle that the arrestment was merely a method of forcing an owner who might be unknown or a foreigner to submit to the jurisdiction and meet the claim, and accordingly the vessel was only released on full security *de judicio sisti et judicatum solvi*. The enforcement, however, of security to this extent was found to be inequitable and frequently to defeat its own purpose, since where the amount of the claim appeared likely to exceed the value of the vessel the owner, if a foreigner, generally preferred to abandon the vessel and allow decree to go against him by default. For

⁷ *Ballintine v. Connon*, 1848, 11 D. 26.

⁸ *Stewart v. Macbeth & Gray*, 1882, 10 R. 382; cf. *Malcolm v. Cook*, 1853, 16 D. 262.

this reason it has now been abolished,⁹ and in no case does the Court now require security of a greater amount than the value of the vessel, even in cases where the amount of the claim exceeds her value.

(a) **For the Value of the Ship.**—Where security for the value of the vessel is required, in the event of parties failing to agree on her value, it is necessary for the value to be assessed either by the Court itself or on remit by a person familiar with the shipping market. For this purpose the value of the vessel is her market value and not her replacement value.¹¹ This is determined as at the time when the obligation in security is undertaken, and the obligation of the surety is not affected by subsequent fluctuations in value, since, as has been pointed out, “to act upon any other view would be to convert into “a mere speculation a business transaction which was intended to produce certainty.”¹²

(b) **For the Amount of the Claim.**—It is only in the case of damage by collision that the claim is likely to exceed the value of the ship, and even in this case, owing to the rule of limitation of liability, such claims are rare. Moreover, the value of a ship is generally difficult to determine. Ships are subject to rapid and extreme fluctuations in value as the conditions of trade or the costs of construction vary from time to time, and there may be at the time of the valuation no market for the particular vessel which is the subject of the claim. For these reasons, except where it is obvious that the amount of the claim is largely in excess of the value of the ship, the owner is generally willing to find security for the amount of the claim in preference to submitting to the delay and expense of a valuation. Where such security is found further arrestments of the ship in respect of the same claim will be prohibited.¹⁴ Where the ship is under arrestment in respect of two or more claims the Court will only release her on security for the amount of the combined claims, since otherwise the rights of some of the claimants might be defeated by the removal of the vessel from the jurisdiction of the Court. The obligation

⁹ See *supra*, p. 34.

¹¹ See *infra*, p. 185.

¹² *The “Borre,”* 1921, P. 390, *the President*, at 397.

¹⁴ *M’Phedron v. M’Callum*, 1888, 16 R. 45.

in security may be so expressed as to apply to any sum which may be found due to the claimant in the event of a settlement of his action.

(c) **For a Claim Against a Part Owner.**—Similar considerations apply to claims against a part owner, and in no case will security be required for a greater amount than the value of his share. The doubt which was formerly entertained whether “the interest of a part owner is not so far a real right in the ship as to be indefeasible by arrestment against a part owner leaving the arrestment to have its effect on the *pro indiviso* share of the ship without interrupting the proper employment of the vessel”¹⁵ has now been determined, and the arrestment of a ship for the debt of a part owner has been held to be competent.¹⁶

(d) **Exceptions to the General Rule.**—These general rules will be departed from in exceptional circumstances on equitable grounds. Thus, if the claim is one for damage and it is admitted that the debtor is entitled to limit his liability, the amount of the security will not be the amount of the claim but the amount of his statutory liability.¹⁷ In one instance, where the right to limit liability had not been admitted, but there was a presumption that it would be proved, the security was fixed, not at the amount of claim, but at one and a half times the amount of the statutory liability. In this case, however, the claim was for a large sum libelled at random.¹⁸ Where a portion of the claim has already been consigned in Court in a multiplepounding the security will be proportionately reduced.¹⁹ Where the arrestment is wrongful security may be entirely dispensed with. Thus, where it appeared that the debtor had no interest whatever in the arrested ship the arrestment was recalled without security.²⁰ Similarly, where it appeared that the ship was registered in the name of a person other than the debtor, the arrestment was recalled without security, notwithstanding that the arrestor averred that the vessel had been fraudulently transferred to the registered owner

¹⁵ Bell, *Comm. on Statutes*, p. 16.

¹⁶ *M'Aulay v. Gault*, F.C. 6th March, 1821; *Malcolm v. Cook*, 1853, 16 D. 262.

¹⁷ *The "Sisters"*, 1876, 1 P.D. 281; *The "Charlotte"*, 1920, P. 78.

¹⁸ *Gudmundsson v. Andersen*, 1921, 1 S.L.T. 210.

¹⁹ *Taylor v. Young*, 1860, 32 Scot. Jur. 540.

²⁰ *Barclay, Curle & Co. v. Sir James Laing & Sons, Ltd.*, 1908 S.C. 82.

by the debtor for the sole purpose of defeating the arrestment.²¹

Release from Arrestment in Execution.—At common law the general rule is that arrestment in execution, “being an act of common execution to enforce payment, cannot be recalled or loosed on caution unless there be ground for suspending the diligence.”²² Where, however, a ship had been arrested in execution for the debt of a part owner, the arrestment has been loosed on the application of a co-owner to the effect of allowing the vessel to proceed on a voyage which was in contemplation, on the co-owner undertaking to make her forthcoming on her return in as good condition as at the date of the arrestment, or otherwise to pay the value of the interest arrested, the Court proceeding on the equitable ground that any other course would be unjust to the co-owner.²³

Obligation to make a Ship Forthcoming.—In certain circumstances the obligation of the surety may be neither to find security for the value of the ship nor for the amount of the claim, but merely to make the ship forthcoming. Security in this form may be used where the claim cannot be estimated in monetary form as in a claim of possession or where the proper amount of monetary security is difficult to estimate. Thus it is appropriate where claims have been made against a part owner the value of whose interest in the ship is uncertain²⁴; or where the value of the claim has not yet been determined; or where the litigation appears likely to be prolonged.²⁵ An immediate valuation of the ship is thus avoided. In such a case the execution of the diligence may be suspended by letters of loosing of the arrestment under an obligation to make the ship forthcoming on the termination of a voyage or series of voyages.

Nature of the Obligation.—At common law the obligation of a cautioner on whose bond an arrestment has been loosed is to make the goods “forthcoming to the arrestor as accords of law.”¹ In the case of a ship, however, the obligation

²¹ *Duffus v. Mackay*, 1857, 19 D. 430; cf. *Bildstein v. Bock & Co.*, 1872, 9 S.L.R. 512.

²² Bell, Comm. ii., 68.

²³ *Malcolm v. Cook*, 1853, 16 D. 262.

²⁴ *Anderson, Child & Co. v. Pott & M'Millan*, 1825, 3 S. 498; *Malcolm v. Cook*, 1853, 16 D. 262.

²⁵ *Middlemass v. Brown*, 1828, 6 S. 511.

¹ Bell, Comm. ii., 70.

incurred by the surety is primarily to the Court and only indirectly to the arrestor. By her arrestment a ship is placed in the custody of the Court for the interests of all parties, and cannot be made directly forthcoming to the arrestor, but merely sold by the Court in a process of sale *in rem* and her proceeds applied in extinction of the arrestor's debt after prior claims have been met. The obligation of the surety is therefore primarily to the Court. In England the principle is similar, and with reference to bail bond granted in similar circumstances in the Admiralty Court of England it has been observed that "this Court is not in the habit of considering the effects of bonds precisely in the same way as they are viewed by the Courts of common law. In these Courts they are very properly considered as mere personal securities for the benefit of those parties to whom they are given. In this place they are subject to more enlarged considerations; they are here regarded as pledges or substitutes for the thing itself in all points fairly in adjudication before the Court."²

(a) **Obligation to Restore the Vessel to the Jurisdiction of the Court.**—A ship can only be made forthcoming at a time when she is actually within the jurisdiction of the Court, either at the beginning or the termination of a voyage. Unless otherwise expressed, the obligation of forthcoming is discharged by the return of the vessel to any port within the jurisdiction, since, as has been pointed out, "when a vessel is within the protection of the country to which she belongs she is within her general home, and the parties are restored as to any legal remedies to the situation in which they stood before the departure of the vessel."³ Accordingly, the surety will be relieved of his obligation on the return of the vessel, even if the arrestor is, in fact, ignorant of her return, and she is lost at sea immediately thereafter or arrested in respect of another claim. For this reason the port to which the cautioner undertakes to return the vessel should be expressed in the bond, which may be either the vessel's home port or, if so agreed, any port whereof due notice has been given to the arrestor.⁴

(b) **Obligation to Restore the Vessel in as Good Condition as when Released.**—At common law the cautioner's

² The "*Nied Elwin*," 1811, 1 Dods, 50, Sir William Scott, at 53.

³ The "*Margaret*," 1829, 2 Hagg. Adm. 275, Sir C. Robinson, at 278.

⁴ Cf. The "*Robert Dickinson*," 1884, 12 P.D. 15.

obligation is to restore the goods *in statu quo*, and he is answerable for injury suffered in consequence of the loosing.⁵ In the case of ships this is commonly expressed to be to restore the ship "in as good condition as at the date of the arrestment." The extent of the obligation implied in this undertaking is uncertain. Not only do ships fluctuate very considerably in value, but they are peculiarly subject to deterioration, and are recognised in law as wasting subjects.⁶ Moreover, doubt has been expressed "whether, if loss has arisen from natural decay, from fall of markets, or from insolvency of the debtor, the cautioner will be responsible, the goods or debts being again restored to the creditor's diligence in the same state as if they had been all along under his arrestment unloosed."⁷ In Scotland, however, there does not appear to be any instance of the surety being relieved of his obligation of forthcoming through lapse of time and natural decay of the vessel, and it has been observed that such a principle if upheld "would enable parties by protracting a lawsuit to free themselves from the effect of the arrestment."⁸ It has been expressly held that an obligation of forthcoming might be enforced after an interval of eight years, and that the surety was only entitled to delivery of his bond on its being reported by a person of skill that the ship was in as good condition as when arrested.⁹ It has also been held that the surety was liable after an interval of fifteen years for the value of a ship at the date of the loosing of the arrestment, notwithstanding a plea that the ship had perished from natural decay. In this case, however, it appeared that the owner had continued to employ the vessel for ten years after the execution of the bond, and to draw profits from its use, and that it had only been classified as seaworthy for a period of ten years from the date of the bond, and, accordingly, that he had already obtained a use which was equivalent to its value. In this case it was pointed out that the words "as she presently lies in the harbour of ———" as inserted in bonds of surety are descriptive merely, and do not imply any warranty of condition on the part of the surety.¹⁰ It is now the

⁵ Bell, Comm. ii., 70.

⁶ *Warrack's Trustees v. Warrack*, 1919 S.C. 522, Lord Justice-Clerk, at 527.

⁷ Bell, Comm. ii., 70.

⁸ *Anderson, Child & Co. v. Pott & M'Millan*, 1825, 3 S. 498.

⁹ *Middlemass v. Brown*, 1828, 6 S. 511.

¹⁰ *Anderson, Child & Co. v. Pott & M'Millan*, *supra*.

practice to avoid ambiguity in this respect by using the words "presently lying in the harbour of ———." Conversely, since the market for ships is subject to great fluctuations, it is possible that the value of the ship may have actually increased during the currency of the bond, and its value may also have been enhanced by the execution of extensive repairs. For this reason, in making the ship forthcoming the surety may place the arrestor in a more advantageous position than if she had remained all along under his arrestment, and may therefore incur a more onerous obligation than that arising under the claim in respect of which the arrestment was originally laid on.¹¹

Duration of the Obligation.—From the above considerations it follows that to regard the obligation as continuing for an unlimited period would be inequitable. A period within which the ship requires to be restored to the jurisdiction should be named in the bond, and is usually that of the termination of the voyage or series of voyages for which she is engaged. Occasionally, however, to avoid the possible need for renewal of the bond, the period is left indefinite. In such circumstances it has been held in England that to regard the obligation of restoration as subsisting in perpetuity would be unreasonable, and that the surety might be relieved of his undertaking on the expiry of three years.¹²

Discharge of the Obligation.—The obligation of the surety is discharged by restoring the ship to the jurisdiction of the Court in terms of the bond. Should he fail to do so it is discharged by paying into Court the value of the ship as at the date of the arrestment, or the value of the debtor's interest in her should he be a part owner. If the amount of the debt should be less than the value of the ship, it is discharged by paying into Court the amount of the debt. If necessary a remit may be made to persons of skill to value the ship.¹³ No interest is allowed on the sum thus paid into Court, since it represents the ship herself, which does not bear interest. It has been pointed out, however, that this rule does not apply to an obligation to make freight forthcoming, since "on the freights somebody must have "got the benefit of the interest which has accrued. It

¹¹ Cf. *The "St. Olaf,"* 1869, 2 Adm. & Ec. 360.

¹² *The "Vivienne,"* 1887, 12 P.D. 185.

¹³ *Anderson, Child & Child v. Pott & M. Millan,* 1834, 12 S. 301.

“affords a natural foundation for a claim of interest, and
 “the pursuer should get it, but as to the value of the vessel
 “there was no stock to yield interest, and we cannot say that
 “there was any *mora* to settle, as it was never till now deter-
 “mined what was to be paid, and therefore I doubt allowing
 “interest on that.”¹⁴

Procedure for Recovering Sum Due under the Obligation.—If the surety fails to pay into Court the sum due under the bond it may be recovered in an action of forthcoming. If the arrestor has obtained decree in the principal action instead of bringing an action of forthcoming directly against the surety for the sum due under the bond, he may lodge a claim in the process of sale following on the arrestment. The former procedure, however, is simpler and more expeditious.¹⁵ Where an action of forthcoming is brought against the surety, and the debtor has either not been called in the principal action or has failed to appear in it, as in the case of an action directed against the master as representing the ship, the debtor should also be called in the action of forthcoming.¹⁶

Expenses: (a) Of Arrestment.—The expenses of arresting a ship on the dependence of a personal action follow the ordinary rule, and are not recoverable by the pursuer as expenses of process. Where, however, proceedings are *in rem*, either *ab initio* or where in a personal action it is necessary to proceed to the sale of the ship, they are allowed as expenses of the process.¹⁷ Thus, in a process of sale where for purposes of the sale the Court granted warrant for the removal of the ship from the place where she was lying, the necessary expenses of the removal, including the cost of a premium of insurance effected for that purpose, have been allowed.¹⁸ Similarly, the expenses of arresting a foreign ship *ad fundandam jurisdictionem* are a proper item in expenses charged against the ship in a process of sale. Where such expenses had been incurred in a proper personal action, but were not recovered under the decree, and a subsequent action *in rem* was rendered necessary in consequence, they were allowed on equitable grounds to rank

¹⁴ *Anderson, Child & Child v. Pott & M'Millan*, 1834, 12 S. 301, Lord Glenlee, at 303.

¹⁵ Smith's Maritime Practice, p. 64.

¹⁶ *M'Donald v. Parlane*, 1834, 12 S. 654.

¹⁷ *Black v. Jehangeer Framjee & Co.*, 1887, 14 R. 678, Lord Shand, at 680; *Hatton v. Aktieselskabet Durban Hansen*, 1919 S.C. 154.

¹⁸ *Brodersen, Vaughan & Co. v. Flacks Rederiaktreselskabet*, 1921, 1 S.L.T. 60.

as a preferential claim in priority to all others in the sale which followed, it being observed that this was merely an equitable extension of the general rule since the arrestment in the prior action rendered arrestment in the subsequent action unnecessary.¹⁹

(b) Of Release.—The expenses of obtaining a bail bond for the release of a ship arrested in the Bill Chamber are not allowed to a successful defender even in an action *in rem*, since they are entirely optional, and in no sense necessary expenses of the process.²⁰ Where, however, a bail bond has been required for an excessive amount in order to secure the release of a ship detained by the Receiver of Wrecks, the owners are entitled to the expenses of the bail bond in so far as it exceeds a reasonable amount.²¹ The same rule is applied to any liability in security to secure release of a ship from arrestment incurred either by banks or guarantee associations or by solicitors with a view to accelerating procedure.²² It is probable that, on similar grounds following the practice in England where the arrestment is wrongous, commission on the bail bond will be allowed.²³ Where a bail bond contained an obligation to pay such sum not exceeding £1000 as may by any competent Court be found due for damages and costs by the owners, and an action for payment was raised against the owners and master of the ship, in which the cautioner was called for his interest and lodged defences, and the defenders were found conjointly and severally liable, and the cautioner paid the expenses of the action in full, it was held that he was entitled to deduct the amount of the expenses thus incurred from the sum of his liability under the bond, on the ground that these were truly expenses of defending the action against the ship.²⁴

¹⁹ *Brodersen, Vaughan & Co. v. Flacks Rederiaktreselskabet*, 1921, 2 S.L.T. 231.

²⁰ *Ellerman's Wilson Line, Ltd. v. Northern Lighthouses Commissioners*, 1921 S.C. 10.

²¹ *Walker Steam Trawling and Fishing Co., Ltd. v. Mitre Shipping Co., Ltd.*, 1913, 1 S.L.T. 67.

²² *Owners of the "St. Clair" v. Owners of the "Audny"*, 1922 S.C. 55, Lord Justice-Clerk, at 89.

²³ *The "Collingrove" : The "Numida"*, 1885, 10 P.D. 158.

²⁴ *Aberdeen Harbour Commissioners v. Adams*, 1910 S.C. 1009.

CHAPTER IV.

NAUTICAL ASSESSORS.

Early Practice.—The practice of employing persons of nautical skill and experience as assessors of the Court in maritime causes is one of considerable antiquity, and in England can be traced to the seventeenth century.¹ In Scotland, however, it appears to have been unknown until a comparatively recent date. The early practice whereby the judges of the Court of Session were accustomed to invite the Admiral of Scotland to sit with them and vote in maritime appeals may be regarded merely as a concession to the exclusive or, in any event, the cumulative jurisdiction of his Court in maritime causes in the first instance.² In 1822 the judges of the Court of Session appear to have remitted *ex proprio motu* to the Admiral commanding the station to report on the relative degrees of fault of two vessels in a case of collision, and thereafter to have apportioned the loss in accordance with his opinion.³ At a later date nautical assessors were directly introduced by the Merchant Shipping Acts for certain specified purposes. It was not, however, until the Nautical Assessors (Scotland) Act⁴ was passed in 1894 that the presence of nautical assessors in maritime causes came to be part of the ordinary practice of the Courts. Their employment in Scotland, therefore, is purely statutory and of recent origin, and there is in Scottish case law a comparative absence of authority on their functions. Frequent reference is therefore necessary to the decisions of the English Courts.

Procedure under the Nautical Assessors (Scotland) Act, 1894.—The Act of 1894 provides that (in the Court of Session and the Sheriff Court) in cases “arising out of or relating to “collision at sea, salvage, towage, or any other maritime “matter,” the Court may, if it thinks fit, and shall on the application of any party, “summon to its assistance at the

¹ Marsden's Select Pleas of the Admiralty, vol. i., p. lxxv.

² *Lord Bothwell v. Flemings*, 1543, M. 7322.

³ *Hay v. Le Neve*, 1822, 1 S. 378; 1824, 2 Sh. App. 395.

⁴ 57 & 58 Vict. c. 40.

"trial or at any subsequent hearing, whether on reclaiming
 "note, appeal, or otherwise, one or more persons of nautical
 "skill and experience who may be willing to act as assessors."
 It further provides that objection to any assessor, either personally or in respect of his qualifications, may be taken by any party to the case and disposed of by the Court.⁵

(a) **Questions to Assessors.**—The judge who tries a case with a nautical assessor is required to make a written note of the questions submitted by him to the nautical assessor and of the answers thereto.⁶ The value of this rule in the event of an appeal being taken and the need for strict compliance with it have been emphasised in a recent case.⁷ In England also, although written questions are not part of the statutory procedure, the value to a Court of Appeal of clearly defined issues of fact to place before nautical assessors has been similarly emphasised.⁸ An example of the type of question which may be put and of the answers thereto will be found in the case of *Hoek van Holland Maatschappij v. Clyde Shipping Company, Limited*.⁹

(b) **Appointment of Assessors.**—The assessors are appointed by the Court from a list of persons approved for the purpose, for the Court of Session by the Lord President, and for the Sheriff Court by the Sheriff of the sheriffdom. The practice is for the Court of Session list to be drawn from officers of His Majesty's Navy or from officers of the Merchant Service who hold an extra master's certificate and have signified their desire to serve. Occasionally in special circumstances, if desired by either party, the Court will apply to Trinity House to nominate one or more of the Elder Brethren to act, as is the custom in England. In the Sheriff Court preparation of the list may be deferred until an application is made to the Court to summon an assessor.¹⁰

(c) **Summoning and Remuneration.**—The Act provides that the Court of Session may by Act of Sederunt prescribe such rules as it thinks fit with regard to the summoning and duties

⁵ Sec. 2.

⁶ Sec. 3.

⁷ S.s. "*Rowan*" v. s.s. "*West Camak*"; s.s. "*Rowan*" v. s.s. "*Clan Malcolm*," 1923 S.C. 316, Lord President, at 342.

⁸ *Owners of s.s. "Melanie" v. Owners of "San Onofre,"* 1919, 35 T.L.R. 507, Lord Birkenhead, L.C., at 507.

⁹ 1902, 5 F. 227.

¹⁰ Sec. 4.

and remuneration of assessors under the Act.¹¹ Such rules have now been prescribed both for the Court of Session and the Sheriff Court. In the Outer House of the Court of Session only one assessor appears to be contemplated, but in the Inner House the number is entirely in the discretion of the Court.¹² It is not, however, customary to summon more than one either in the Outer or the Inner House, the practice thus differing from that in England, where the invariable rule is to summon two, and where in cases of doubt and difficulty three or more may be summoned.¹³ In the Sheriff Court similar rules are prescribed. There the number of assessors is one in the case of a proof, and one or more in the case of a hearing on appeal as the Court may think fit.¹⁴ The Acts of Sederunt also prescribe their remuneration, but no provision is made regarding their duties, which are determined entirely by judicial decision.

(d) **Assessors in the House of Lords.**—For the hearing of Scotch appeals the House of Lords may call in the assistance of one or more assessors specially qualified, and hear the appeal either wholly or in part with their assistance.¹⁵ Their summoning and remuneration is regulated by the House of Lords Orders, 1923. Two assessors are summoned, one of whom requires to be an officer, active or retired, of His Majesty's Navy, and the other an Elder Brother of Trinity House. They are drawn from a list jointly furnished by the Secretary of the Admiralty and the Secretary of Trinity House.¹⁶

Duties of Nautical Assessors.—The duties of nautical assessors are purely advisory, and their presence in no sense relieves the Court of forming its own judgment even in matters involving nautical skill and experience.¹⁷ In these matters, however, the Court will be slow to disregard their opinion.¹⁸ They are, however, only advisers of the Court in such matters as it thinks fit to refer to them.¹⁹ The value to

¹¹ Sec. 5.

¹² Codifying Act of Sederunt, A. viii. ; Act of Sederunt, 25th June, 1919.

¹³ Roscoe's Admiralty Practice, p. 360.

¹⁴ Codifying Act of Sederunt, L. i.

¹⁵ Sec. 6.

¹⁶ House of Lords Orders, 1923, R. 40, App. E.

¹⁷ *Owners of s.s. "Gannet" v. Owners of s.s. "Algoa,"* 1900 A.C. 234.

¹⁸ *Owners of s.s. "Lebanon" v. Owners of s.s. "Ceto,"* 1889, 14 A.C. 670.

¹⁹ *Owners of s.s. "Melanie" v. Owners of s.s. "San Onofre,"* 1919, 35 T.L.R. 507, Lord Birkenhead, L.C., at 507.

be placed on their opinion has been thus stated—"Although
 "I myself should place considerable reliance on expert opinion
 "with respect to technical manœuvres or something which had
 "reference to what was or was not to be done for the purpose
 "of avoiding some impending accident by some nautical
 "arrangement, I confess that, dealing with mere questions of
 "fact to be determined upon the weight and balance of evi-
 "dence, I will not surrender my own judgment to that of the
 "gentlemen who are good enough to assist us with their nauti-
 "cal skill and experience."²⁰ In one instance the Court
 reversed the judgment of the Lord Ordinary, who had acted on
 the opinion of the nautical assessor to the effect that in certain
 circumstances the master of a vessel must have been aware
 that his ship was dragging her anchor, on the ground that it
 was unsupported by the evidence.²¹

Rules of Evidence when Nautical Assessors are Present.—

In England it is the practice to exclude expert evidence on
 matters of nautical skill and experience where nautical
 assessors are present, on the ground that they are them-
 selves expert, and that it is their duty to advise the
 Court in such matters,²² and it has been observed that the
 opinion of a nautical assessor is not evidence, but a substitute
 for evidence.²³ The practice followed by Courts of Admiralty
 has been thus stated—"The practice of the Court of Admiralty
 "with respect to evidence on points of nautical science is dif-
 "ferent from that of other Courts. In other Courts questions
 "of nautical skill and science as to the management and move-
 "ment of ships may be proved by the evidence of experts.
 "But that is not the way in which the Court of Admiralty is
 "instructed in such matters. It has other means of instruc-
 "tion through the presence of nautical assessors. . . . I
 "wish, however, to limit my observations as to the evidence
 "of experts to questions concerning the management of the
 "manœuvres of ships. The Court of Admiralty would, of
 "course, rightly receive evidence of experts on other subjects,
 "such, for example, as the loading of ships, a matter not
 "strictly within the provision of the nautical assessors."²⁴ In

²⁰ *Owners of s.s. "Gannet" v. Owners of s.s. "Algoa," supra*, Lord Halsbury, L.C., at 236.

²¹ *Cambo Shipping Co. v. Dampskibsselskabet Carl*, 1920 S.C. 26.

²² *The "Kirby Hall,"* 1883, 8 P.D. 71.

²³ *The "Tynwald,"* 1895, P. 142, the President, at 146.

²⁴ *The "Sir Robert Peel,"* 1880, 4 Asp. M.L.C. 321, Brett, L.J., at 322.

Scotland, although there is no settled rule, the practice appears to have hitherto been to admit expert evidence where assessors are present. In a recent case, however, Lord Hunter observed that while sitting in the Outer House with a nautical assessor it had been his own invariable practice to follow the English rule and disallow expert evidence on matters of nautical skill and experience.²⁵ It is, however, within the province of the Court to decide what are and what are not matters of nautical skill and experience. The qualification in Scotland that nautical assessors shall possess an extra master's certificate appears to contemplate their advice being taken in questions of theoretical as well as of practical seamanship. It has been held, however, that deductions regarding the speed of a vessel from the nature and extent of the fractures which she has made in the hull of another vessel with which she has been in collision are matters of engineering and not of nautical skill and experience.¹ A theory based on a mathematical inference as to the probable speed of a ship from the direction from which sound appeared to be coming has been rejected, on the ground that it was not put to the witnesses. In this case, although the opinion of the nautical assessor was followed, it is not clear whether the question was regarded as one of nautical skill and experience or not.² The question whether screw alleys are liable to emit smells which may damage a sensitive cargo has been treated as one for nautical assessors.³

Nautical Assessors and Trial by Jury.—It is now the invariable practice in Scotland to decline to send a case to jury trial where a nautical assessor has been asked for, since questions which are appropriate for a nautical assessor are *ipso facto* unsuitable for a jury, and when demands are made for both forms of trial that for a jury trial must give way.⁴ In England a similar practice is followed, both on the ground that a jury is required to decide in accordance with the evidence, and that the presence of assessors excludes expert evidence on matters of nautical skill and experience, and on the ground that it would be inconsistent with their oath for a jury to be

²⁵ *S.s. "Bogota" v. s.s. "Alconda,"* 1923 S.C. 526, at 542.

¹ *The "Nerano" v. The "Dromedary,"* 1895, 22 R. 237, Lord President, at 243.

² *The "Warsaw" v. The "Linn o' Dee,"* 1906, 8 F. 1013.

³ *The "Assyrian,"* 1890, 6 Asp. M.L.C. 525.

⁴ *M'Lean v. Johnstone,* 1906, 8 F. 836; *Leadbetter v. Dublin and Glasgow Steam Packet Co.,* 1907 S.C. 538; *Kerr v. Screw Collier Co., Ltd.,* 1907, 15 S.L.T. 444; *Rodger v. Glen Coats,* 1913, 1 S.L.T. 434.

guided by assessors.⁵ It appears, therefore, that the general right to trial by jury is limited by the provisions of sec. 2 of the Act in cases where one party asks for trial with a nautical assessor and the other for trial by jury.

Authority of English Practice.—It is not clear to what extent the Court in Scotland will be guided by English practice. In one case a motion to follow the English practice regarding the security to be provided for the charges of the nautical assessors in an appeal under sec. 475 of the Merchant Shipping Act from a Court of inquiry was refused without reasons being stated.⁶ In general it is thought that the English practice will be followed in so far as it is applicable and no contrary practice already exists in Scotland.

Inspection of Ships.—In England "any party in a cause in " the High Court of Admiralty shall be at liberty to apply to " the said Court for an order for the inspection by the Trinity " Masters or others appointed for the trial of the said cause, " or by the party himself or his witnesses, of any ship or other " personal or real property, the inspection of which may be " material to the issue of the cause."⁷ Under this provision not only have ships been inspected, but experiments with them have been made.⁸ In one instance the Court with the nautical assessors adjourned to attend tank experiments illustrating the effect of suction on a vessel.⁹ Where assessors are thus directed to inspect a vessel and report to the Court, their report is not necessarily confined to those matters on which evidence has been led, but may include any circumstances affecting the merits of the case.¹⁰ It has, however, been observed that such inspection by nautical assessors should be postponed until after the hearing of the case, since otherwise a tendency would arise for the substitution of their opinion for the evidence of the witnesses in matters with which they were not directly concerned.¹¹ In Scotland, although there is no reported decision, there is no reason why a similar practice should not on occasion be followed.

⁵ *The "Tynwald,"* 1895, P. 142.

⁶ *Thain v. Board of Trade*, 1923 S.C. 548.

⁷ Admiralty Court Act, 1861 (24 Vict. c. 10), sec. 18; Rules of the Supreme Court, Order 50, rule 3.

⁸ *The "Marathon,"* 1879, 4 Asp. M.L.C. 75; *The "Victor Covacevich,"* 1885, 10 P.D. 40.

⁹ *The "Olympic,"* 1913, P. 214.

¹⁰ *The "Marathon,"* *supra*.

¹¹ *The "Victor Covacevich,"* *supra*.

Nautical Assessors for Special Purposes: (a) Pilotage Appeals.—Provision is also made for the employment of nautical assessors for special purposes. Thus, in appeals to the Sheriff Court by a pilot against the action of the pilotage authorities with reference to his licence the Court is required to sit with an assessor “of nautical and pilotage experience” selected and summoned by itself.¹² The provisions of the Nautical Assessors (Scotland) Act of 1894 and of the relative Acts of Sederunt are expressly made applicable.¹³

(b) Summary Determination of Salvage Disputes.—In the summary determination of salvage disputes under the Merchant Shipping Act the Court may call in the assistance of “any person conversant with maritime affairs as assessor.”¹⁴ Procedure is as provided in the Nautical Assessors (Scotland) Act of 1894 and the relative Acts of Sederunt.

(c) Courts of Investigation and Inquiry.—In formal investigations of shipping casualties,¹⁵ in inquiries into conduct of certificated officers by Courts of summary jurisdiction,¹⁶ and in rehearings of and appeals from such investigations and inquiries,¹⁷ the Court is required to hold the same with the assistance of “one or more assessors of nautical engineering or other special skill or knowledge.” Procedure is regulated by the Shipping Casualty Appeals and Rehearings Rules, 1923.¹⁸

(d) Courts of Survey.—In Courts of Survey the Court is required to sit with two assessors of “nautical engineering or other special skill or experience.”¹⁹ Procedure is regulated by the rules of the Court of Survey, 1876.²⁰

Expenses.—The Nautical Assessors (Scotland) Act, 1894,²¹ provides that the remuneration of assessors “shall be treated as expenses in the action or proceeding unless otherwise ordered by the Court.” In the Court of Session the motion for summoning assessors is only granted on the condition that the party

¹² The Pilotage Act, 1913 (2 & 3 Geo. V. c. 31), sec. 28 (2) (7), sec. 60.

¹³ Codifying Act of Sederunt, L. i., L. xi.; Act of Sederunt, 29th Oct., 1919.

¹⁴ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 548 (2).

¹⁵ Merchant Shipping Act, 1894, sec. 466.

¹⁶ Merchant Shipping Act, 1894, sec. 471 (4).

¹⁷ Merchant Shipping Act, 1894, sec. 475.

¹⁸ Rules 20 (e), 21-26, Appendix, Part II.

¹⁹ Merchant Shipping Act, 1894, sec. 487 (1) (3).

²⁰ Rules 10, 11, 12.

²¹ 57 & 58 Vict. c. 40, sec. 5.

making the application shall consign with the principal Clerk of Session such sum to meet the fees and expenses of the assessors as the Court may determine. Where the assessor is summoned *ex proprio motu* of the Court, such consignment is made by the pursuer, unless the Court otherwise directs.²² The sum usually required is £25. In the Sheriff Court the rule is similar, with the exception that consignment is there made with the Sheriff-clerk.²³ It has been observed that the proper time for determining liability for the fees of nautical assessors is when the question of expenses is raised at the conclusion of the hearing. Their fees do not, however, appear to be treated as in all respects *in pari casu* with the expenses of the action. Thus, where the Sheriff had found one party solely to blame for a collision, and had held him liable in the expenses, including those of the nautical assessor, and the Court of Session on appeal had recalled his interlocutor and found both parties equally to blame and no expenses due to or by either party, either in the Sheriff Court or the Court of Session, the Court directed that each party should pay half the nautical assessor's fee in the Court of Session, but declined to alter the Sheriff's finding in so far as it applied to the nautical assessor's fee in the Sheriff Court.²⁴ It was observed, however, that there was no settled practice. A sum consigned in Court to cover the expenses of an appeal from a Court of investigation of a shipping casualty has been treated by the Court as covering the expenses of a nautical assessor.²⁵ In the House of Lords the attendance fees of the assessors require to be paid by the party against whom costs have been awarded, or by his agent, into the Fee Fund of the House immediately after the determination of the cause.²⁶

²² Codifying Act of Sederunt, A. viii., 9.

²³ Codifying Act of Sederunt, L. i., 3.

²⁴ *Hay & Sons v. Ocean S.S. Co., Ltd.*, 1917, 54 S.L.R. 354.

²⁵ *Thain v. Board of Trade*, 1923 S.C. 548.

²⁶ House of Lords Orders, 1923, App. E.

CHAPTER V.

STATUTORY PROCEDURE.

(A) PROCEDURE UNDER THE MERCHANT SHIPPING ACT, 1894.

General Intention of the Act Regarding Procedure.—

The general intention of the Merchant Shipping Act, 1894,¹ is that by means of summary procedure in the inferior Courts a cheap and expeditious method of determining the claims to which it refers should be provided, and that in such proceedings review should, so far as possible, be precluded. The Act is largely concerned with proceedings of a penal character, regarding which it has been observed that “these regulations of “the Merchant Shipping Act, although very important to commercial interests, are not considered as likely to raise questions of legal difficulty suitable for the determination of the “High Court of Justiciary, and, accordingly, the administration of this branch of the penal law is committed entirely to “Sheriffs and magistrates and no review is permitted.”² The Act, however, also makes provision for proceedings of a purely civil character. Certain of its provisions are of general application, while others are expressly confined to Scotland.

Procedure to be Followed in Scotland: (a) Provisions of General Application.—In general, so far as applicable, the procedure to be followed is that of the Summary Jurisdiction Acts. The Act provides—

“Sec. 681 (1). The Summary Jurisdiction Acts shall, so far as applicable, apply—

“ (a) To any proceeding under this Act before a Court of summary jurisdiction, whether connected with an offence punishable on summary conviction or not; and

“ (b) To the trial of any case before one justice of the peace, where under this Act such a justice may try the case.”

¹ 57 & 58 Vict. c. 60.

² *Simpson v. Board of Trade*, 1892, 19 R. (J.) 66, Lord MacLaren, at 77.

This provision, however, appears to be framed primarily with reference to the English Summary Jurisdiction Acts and with reference to the procedure of the English Courts of summary jurisdiction which possess a civil as well as a criminal jurisdiction. The expressions "offence," "fine," and "penalty" are used in the Act in a wider sense than in the Scottish Summary Jurisdiction Acts. Thus, the Act provides for the determination of questions of "offences" in civil proceedings³; it contemplates the recovery in England of "fines" as civil debts⁴; and a claim by a seaman for compensation for unreasonable detention of wages, although it appears to be one for a "penalty" in the sense of the Act, has been held in Scotland to be "of the essence of civil compensation," and therefore outwith the scope of the Summary Jurisdiction Acts.⁵ Moreover, in Scotland the expression "Court of Summary Jurisdiction" is used only in the sense of "Court of Summary Criminal Jurisdiction," and the Summary Jurisdiction Acts apply only to proceedings which may be deemed to be of a criminal nature. In Scotland, in cases where proceedings are taken under the Summary Jurisdiction Acts, the provisions for appeal contained in these Acts overrule the provisions for appeal contained in other Acts of Parliament, and, accordingly, in such cases the finality clause of the Merchant Shipping Act does not apply.⁶ By the Act procedure in Scotland under the Summary Jurisdiction Acts is so far varied in cases to which it applies that the proceedings "when of a criminal character or for fines or penalties may be taken at the instance of any party aggrieved with concurrence of the procurator-fiscal of Court."⁷ The Act further provides that when fines are imposed the Court may direct the whole or any part of the fine to be applied in compensating any person for any wrong or damage he may have sustained by the offence, or in payment of the expenses of the proceedings.⁸ It has been held that the expression "party aggrieved" applies only to individuals aggrieved, and not to corporations, and, accordingly, that a complaint at the instance of the Board of Trade is incompetent notwithstanding the general powers which it possesses under sec. 713 to carry into

³ Sec. 233.

⁴ Sec. 681 (2).

⁵ *Alexander v. James Little & Co.*, 1906, 8 F. 841, Lord President, at 847.

⁶ *Alexander v. James Little & Co.*, 1906, 8 F. 841, Lord President, at 846.

⁷ Sec. 703.

⁸ Sec. 699 (1).

execution the provisions of the Act.⁹ Since in Scotland proceedings under the Summary Jurisdiction Acts are reviewable only in the High Court of Justiciary, they are properly outwith the scope of the civil jurisdiction of the Scottish Courts.

(b) **Provisions of Special Application to Scotland.**—In proceedings to which the Summary Jurisdiction Acts cannot be made applicable no precise provision is made regarding the procedure to be followed in Scotland. The Act contains certain general directions which are intended to apply to civil as well as criminal proceedings. Thus it provides—

“Sec. 703. In Scotland all . . . actions and proceedings . . . under this Act . . . may be brought in “a summary form before the Sheriff of the county or before “any two justices of the peace of the county or burgh where “the cause of such . . . action arises or where the . . . “defender may be for the time.”

Although this provision is applicable to “all” actions and proceedings under the Act, it is merely permissive, and no definition is given of the expression “in a summary form.” It is probably necessary, therefore, in such cases to follow the ordinary procedure of the Sheriff or Justice of the Peace Courts. This has been expressly held with reference to “disputes as to “the amount of salvage” which in cases of a certain value require to be determined “summarily in manner provided by “this Act” in the Sheriff Court.¹⁰ It has been held, in the absence of express direction to the contrary, that the procedure applicable to such disputes is that of the ordinary roll of the Sheriff Court, expedited so far as may be possible to meet the circumstances, and that the expression “summarily” is not a *nomen juris*, but refers merely to the cheaper and more expeditious procedure of the Sheriff Court as contrasted with that of the Court of Session.¹¹

It has been pointed out that the jurisdiction conferred on the Sheriff and Justice of the Peace Courts by the above provision is “a highly artificial one.”¹² By it the position of a defender in proceedings under the Act appears to be assimilated to that of an itinerant.¹³

⁹ *Simpson v. Board of Trade*, 1892, 19 R. (J.) 66.

¹⁰ Sec. 547.

¹¹ *Thirle v. Copin*, 1912, 29 Sh.Ct.Rep. 13; see *infra*, p. 222.

¹² *Simpson v. Board of Trade*, 1892, 19 R. (J) 66, Lord Justice-General, at 72.

¹³ Cf. *Linn v. Casadinos*, 1881, 8 R. 849; see *supra*, p. 12.

The Act contains also certain other provisions specially applicable to Scotland. Thus where the action is "in whole or in part for the enforcement of a pecuniary debt or demand the complaint may contain a prayer for warrant to arrest upon the dependence."¹⁴ The deliverance of the Sheriff-clerk or of the clerk of the peace is required to contain warrant to arrest upon the dependence in common form "where that warrant has been prayed for in the complaint or other proceeding."¹⁵ When it is necessary to execute the arrestment "against goods or effects of the defender within Scotland, but not locally situated within the jurisdiction of the Sheriff or justices of the peace by whom the warrant to arrest has been granted," the warrant may be executed on being endorsed by the Sheriff-clerk or clerk of the peace of the county or burgh within which the warrant comes to be executed.¹⁶ When a decree "for payment of any sum of money" has been obtained, the decree is required to contain warrant for arrestment, poinding, and imprisonment in default of payment.¹⁷ It has been observed, however, that this provision merely provides a mode of recovering the money, and does not necessarily make the proceedings criminal in character.¹⁸

The Act further provides that nothing in it "shall be held in any way to annul or restrict the common law of Scotland with regard to . . . the rights of owners or creditors in regard to enforcing a judicial sale of any ship and tackle, or to give to the High Court in England any jurisdiction in respect of salvage in Scotland which it has not heretofore had or exercised."¹⁹ The right of proceeding *in rem* in Admiralty in such cases is thus preserved, and the jurisdiction of the English High Court in salvage expressly excluded in cases where the vessel is within the jurisdiction of the Scottish Courts.

Appeal.—The provisions regarding appeal are of a special character. Thus in summary proceedings for recovery of "any penalty or sum of money in Scotland," if the defender, when duly cited, fails to appear, he is held as confessed, although he may repone against the decree at any time before it is fully

¹⁴Sec. 704.

¹⁵Sec. 705.

¹⁶Sec. 706.

¹⁷Sec. 707.

¹⁸*Alexander v. James Little & Co.*, 1906, 8 F. 841, Lord President, at 848.

¹⁹Sec. 710.

implemented.²⁰ In proceedings under this provision the opinion has been expressed that the defender is not entitled to repone on the grounds that he is under contract to rejoin his ship, that he was only cited to appear on the night before the ship sailed, and that when he had appeared he was not informed of his right to repone.²¹ The Act also provides that "orders, "decrees, and sentences" pronounced under the Act are not to be quashed or vacated for any "misnomer, informality, or "defect of form," and are to be final and conclusive, and not to be suspended or reduced except on the ground of corruption or malice on the part of the Court.²² These provisions have been held to apply to summary proceedings in general brought under the Merchant Shipping Acts, but not to complaints brought expressly under the Summary Jurisdiction Acts, review of which is allowed in terms of these Acts alone.²³ In proceedings outwith the provisions of the Summary Jurisdiction Acts appeals will only be entertained if a case of gross miscarriage of justice has been made out.²⁴

Preservation of Common Law Remedies.—The remedies provided in the Act are not exclusive of the ordinary remedies which exist at common law. The Act expressly provides that nothing contained in the sections relating to offences against discipline or of desertion or absence without leave²⁵ "shall take away or limit any remedy by action or by summary procedure before justices which an owner or master would but for those provisions have for any breach of contract in respect of the matters constituting an offence under those sections, but an owner or master shall not be compensated more than once in respect of the same damage."²⁶ This provision is probably merely declaratory of the common law of Scotland in all cases, and is applicable to all statutory remedies under the Acts, since it has been observed that "as a general rule, where a new remedy is introduced, the common law remedy is not cut off except by express words or by very clear implication."²⁷

²⁰ Sec. 708.

²¹ *Simpson v. Board of Trade*, 1892, 19 R. (J.) 66.

²² Sec. 709.

²³ *Alexander v. James Little & Co.*, 1906, 8 F. 841, Lord President, at 846.

²⁴ *Sinclair v. Spence*, 1883, 10 R. 1077, Lord President, at 1079.

²⁵ Secs. 221-225.

²⁶ Sec. 226.

²⁷ *Sharp v. Rettie*, 1884, 11 R. 745, Lord President, at 753.

Rules of Evidence.—The common law of evidence is considerably modified. Thus, in legal proceedings instituted in the United Kingdom, where it is proved that a witness cannot be found in the United Kingdom, his deposition, if previously made elsewhere on oath in relation to the same matter, is admissible in evidence subject to certain conditions.¹ Documents which require to be attested may be proved by the evidence of any person able to bear witness to the requisite facts without calling the attesting witnesses.² Documents which are admissible in evidence under the Act may be proved, either by their production or by proof that they are examined copies or extracts of the original or if purporting to be certified as a true copy or extract, by the officer to whom the original document was entrusted.³ Exemptions in relation to any offence may be proved by the defender, but need not be specified or negatived in any information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived is required on the part of the informant or complainant.⁴

Other Special Provisions.—In certain other respects also the common law is modified. Thus, “where for the purposes “of this Act any document is to be served on any person, that “document may be served (a) in any case by delivering a copy “thereof personally to the person to be served or by leaving “the same at his last place of abode; and (b) if the document “is to be served on the master of a ship, where there is one, “or on a person belonging to a ship, by leaving the same for “him on board that ship with the person being or appearing “to be in command or charge of the ship; and (c) if the document is to be served on the master of the ship, where there is “no master and the ship is in the United Kingdom, on the “managing owner of the ship, or, if there is no managing “owner, on some agent of the owner residing in the United “Kingdom, or, where no such agent is known or can be found, “by affixing a copy thereof to the mast of the ship.⁵ The “Board of Trade may take any legal proceedings under this “Act in the name of any of their officers.”⁶ Certain instru-

¹Sec. 691.

²Sec. 694.

³Sec. 695.

⁴Sec. 697.

⁵Sec. 696.

⁶Sec. 717.

ments are exempt from stamp duty.⁷ Where fines are imposed for which no specific application is otherwise provided, the Court may, if it thinks fit, direct the whole or any part of the fine to be applied in or towards the expenses of the proceeding.⁸ Summary proceedings under the Act are subject to a special limitation of time.⁹

(B) LIMITATION OF ACTIONS UNDER THE
MARITIME CONVENTIONS ACT, 1911.

Provisions of the Act.—The period within which actions may be maintained to enforce certain claims is limited by the Maritime Conventions Act, 1911, to two years, subject to extension in certain circumstances. The claims to which this provision applies are those for damage by collision, for salvage, and for contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries, the general intention of the provision being to protect shipowners from vexatious claims brought so long after the event that they may be prejudiced in their defence. The Act provides that “no action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo, or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or salvage services were rendered; and an action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment: provided that any Court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of Court, extend any such period, to such extent and on such conditions as it thinks fit, and shall if satisfied that there has not during such period been any reasonable opportunity of arresting the

⁷ Sec. 721 ; see Appendix, p. 390.

⁸ Sec. 699.

⁹ Sec. 683.

"defendant vessel within the jurisdiction of the Court, or
 "within the territorial waters of the country to which the plain-
 "tiff's ship belongs or in which the plaintiff resides or has his
 "principal place of business, extend any such period to an
 "extent sufficient to give such reasonable opportunity."¹⁰ It
 will be seen that the section thus comprises a general declara-
 tion and a proviso which is divided into two heads, and that it
 bars the "maintenance" of an action merely and not the action
 itself, which may competently be raised at any time even after
 the expiry of the two years.¹¹ It has been observed that it pro-
 vides a limitation of a very peculiar kind, and contains a pro-
 viso unknown to any other statute of limitation.¹²

Application to Scotland.—The provision appears to be
 framed primarily with reference to procedure in an action
in rem in English form, and its application to Scottish
 procedure is not entirely clear. Thus, the expression
 "reasonable opportunity of arresting the defendant vessel"
 obviously cannot be applied literally in Scotland, where
 proceedings may be entirely personal or based on the
 arrestment *ad fundandam jurisdictionem* of any vessel belong-
 ing to the same owners, and not necessarily of the actual vessel
 which has given rise to the claim. The opinion has been ex-
 pressed that it may be construed as meaning in Scotland
 "reasonable opportunity of founding jurisdiction against the
 "owners."¹³ On similar grounds also it may be assumed that in
 Scotland the expression "any Court having jurisdiction to deal
 "with an action to which this section relates" means any Court
 in which jurisdiction may be established against the owner by
 arrestment *ad fundandam jurisdictionem*, and not any Court
 already possessing jurisdiction *ab ante*, since otherwise in the
 case of a foreign vessel jurisdiction would be excluded unless
 the vessel was actually within the jurisdiction and proceedings
in rem had been taken.

The first part of the proviso is permissive, and gives the
 Court an unfettered discretion to extend the period
 for maintaining the action or not as it thinks fit,
 and the second part is imperative and makes the exten-
 sion obligatory in certain events. The opinion has been

¹⁰ 1 & 2 Geo. V. c. 57, sec. 8.

¹¹ *The "Dorie" S.S. Co., Ltd., Petr.*, 1923 S.C. 593, Lord Justice-Clerk, at 595.

¹² *The "Esposito,"* 1920, P. 223.

¹³ *The "Reresby" v. The "Cobetas,"* 1923 S.L.T. 492.

expressed that the condition contained in the second part of the proviso, that there has been no reasonable opportunity of arresting the defendant vessel, must be read also into the first part, and that, if the judge of first instance who hears the case is satisfied that the conditions of the second part have not been fulfilled, a Court of Appeal has no power to interfere.¹⁴ The opinion has also been expressed that the first part of the proviso applies primarily at least to proceedings *in personam*, and the second to proceedings *in rem*.¹⁵ It follows, therefore, that in Scotland, where proceedings are generally *in personam*, the Court has more frequent opportunity of exercising its discretion than in England, where proceedings are generally *in rem*, and that in Scotland it is only in the event of the pursuer electing to proceed directly against the actual vessel which has given rise to the claim that the imperative part of the proviso comes into operation. No rules of Court have yet been issued, but this in no way fetters the discretion of the Court.¹⁶

Procedure in Applications for Extension.—In cases where it is desired to obtain an extension of the period, the former practice was to apply to the *nobile officium* of the Court of Session. In one case such an application was granted “on the condition that the petitioners should satisfy the Lord Ordinary, before whom the action is brought, that the petitioners have not had any reasonable opportunity of raising the said action at an earlier period.”¹⁷ In a later case, however, it was held that appeal to the *nobile officium* of the Court was unnecessary, if not incompetent, since the discretion conferred by the proviso is such as can only be properly exercised by the judge of first instance who hears the case on its merits and is seized with the facts, and not by a Court of Appeal which might subsequently be called upon to review its own order, and since in any event an *ex parte* application is inappropriate. It was therefore held that the correct procedure was for the claimant to raise an action in ordinary form, either within the prescribed period or, if necessary, without it, and thereafter, after convening the proper objectors, to apply to the Court before which the action had been raised for the required extension of time. If necessary, the Court will allow a preliminary proof.¹⁸

¹⁴ The “*Arraitz*,” 1924, 40 T.L.R. 867.

¹⁵ The “*Dorie*” S.S. Co., Ltd., *Petr.*, *supra*, Lord Anderson, at 598.

¹⁶ The “*Dorie*” S.S. Co., Ltd., *Petr.*, *supra*.

¹⁷ The “*Birkdale*” S.S. Co., Ltd., *Petr.*, 1922 S.L.T. 575.

¹⁸ The “*Dorie*” S.S. Co., Ltd., *Petr.*, *supra*.

Circumstances in which an Extension will be Granted.—

A heavy onus rests on the applicant to show cause why an extension should be granted.¹⁹ Although the discretionary powers of the Court to extend the period in appropriate circumstances are quite unfettered, they should not be lightly exercised.²⁰ It is obvious that a too liberal interpretation of its powers by the Court might render nugatory the international convention of maritime States on which the provision is based. The period has been extended in a case where the pursuer had failed to arrest a vessel belonging to the defenders which was actually within the jurisdiction of the Court within the prescribed period, on the ground that the vessel had only recently been acquired by the defenders, and that the pursuer was therefore not in a position to discover the change of ownership. The extent to which an applicant is required to be familiar with the latest issue of Lloyd's Register of Shipping was considered by the Court.²¹ The period has been extended on the ground that proceedings for limitation of liability were pending.²² It has been extended in the case of a vessel which, owing to its being under requisition and then immediately leaving the jurisdiction, was only arrestable for a period of ten days within the prescribed period.²³ Where an action had been raised within the prescribed period, but not called at the request of the defenders, and the summons had in consequence fallen and a second action had been raised outwith the prescribed period, it was held that the defenders had suffered no such prejudice as was contemplated in the Act, and, therefore, that the period might be extended.²⁴ Belief on reasonable grounds that no action will be necessary will also probably be held to be ground for extension.²⁵ An extension, however, will not be granted merely on the ground that the applicant is ignorant of the existence of a right of action, since the provision confers substantive rights on the owners of defendant vessels which should not lightly be set aside.²⁶

¹⁹ *Essien v. Clan Line Steamers, Ltd.*, 30th May, 1925 (not reported).

²⁰ *The "James Westoll"*, 1923, P. 94.

²¹ *The "Reresby" v. The "Cobetas"*, 1923 S.L.T. 719; cf. *The "Kong Magnus"*, 1891, P. 223, the President, at 229.

²² *The "Dispenser"*, 1920, P. 228.

²³ *The "Largo Law"*, 1920, 15 Asp. M.L.C. 104.

²⁴ *Essien v. Clan Line Steamers, Ltd.*, 30th May, 1925 (not reported).

²⁵ H.M.S. "*Archer*," 1919, P. 1.

²⁶ *The "Kashmir"*, 1923, P. 85.

Persons Entitled to the Benefits of the Provision.—The provision applies, not only to the owners, but also to any person other than the owners responsible for the fault of the vessel as if the expression “owners” included such persons.²⁷ This is to some extent merely declaratory of the existing law, since responsibility for the negligence of persons in charge of a vessel depends not on ownership but on employment of the persons whose negligence causes the damage.²⁸ The provision does not either expressly or by implication withdraw the protection conferred on public authorities by the Public Authorities Protection Act, 1893.²⁹ It does not impose any limitation on actions raised by the Crown.³⁰

(C) DETENTION OF SHIPS.

(a) Detention for Damage.—In certain circumstances statutory procedure for detaining ships from proceeding to sea may be adopted. Foreign ships may be detained for injury caused in any part of the world to “any property belonging to Her Majesty or to any of Her Majesty’s subjects.”³¹ The order of detention may be obtained from the Court of Session or from the Sheriff of the county within whose jurisdiction the ship may be upon its being shown by any person applying summarily that the injury was “probably caused by the “misconduct or want of skill of the master or “mariners of the ship,” and may be directed to “any “officer of customs or other officer” named by the Court. The vessel will then only be released on satisfaction for the damage or on adequate security.¹ No rules of procedure have been issued, but it is thought that the Court will follow the rules so far as applicable provided by Act of Sederunt under the Workmen’s Compensation Acts,² which are the only rules regarding detention of ships in force in Scotland. The opinion has been expressed that the detention confers a possessory lien on the person detaining the vessel.³

²⁷ Maritime Conventions Act, 1911 (1 & 2 Geo. V. c. 57), sec. 9 (4).

²⁸ *Simpson & Co. v. Thomson*, 1877, 5 R. (H.L.) 40, Lord Blackburn, at 48.

²⁹ 56 & 57 Vict. c. 61; *The “Danube II.”* 1921, P. (C.A.) 183.

³⁰ *The “Loredano,”* 1922, P. 209.

³¹ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 57), sec. 688 (1).

¹ Sec. 688 (1).

² Act of Sederunt, 20th Dec., 1924, sec. 18.

³ *Mersey Docks and Harbour Board v. Hay*, 1923 A.C. 345, Lord Sumner, at 383.

The purpose of the power of detention is to allow sufficient time for an action of damage to be raised. The provision regarding security renders arrestment on the dependence of such an action unnecessary. Owing, however, to the common law power of arrestment *ad fundandam jurisdictionem*, whereby jurisdiction may be at once founded, it has seldom been found necessary to exercise the power of detention in Scotland. The power may be exercised at any time after the damage has been incurred, if the foreign vessel is found in any port or river of Scotland or within three miles of the coast.⁴ It has been observed that it is without prejudice to any other powers which the Court may have at common law.⁵

(b) **Detention for Survey.**—Ships may be detained by the Board of Trade on a variety of grounds. In the interests of public safety, where a British ship being in any port in the United Kingdom is an “unsafe ship,” she may be detained by order of the Board of Trade either provisionally for the purpose of survey or finally.⁶ Foreign ships may also be detained as “unsafe ships,” but in the case of foreign ships the circumstances in which the power of detention may be exercised are not precisely similar.⁷ Certain rules of procedure are provided.⁸ The order of detention may proceed “on complaint” or otherwise,⁹ but it is unnecessary that the complaint should state in terms that the ship is unfit to proceed to sea, provided that sufficient facts are libelled to satisfy the Board of Trade of the necessity of the order. The opinion has been expressed that the complaint may be brought by any person, and the order of the Board following on it is valid if made by letter to the solicitors of the owners.⁹ If the vessel is detained without “reasonable or probable cause,” the Board is liable to pay both the expense of the detention and compensation for loss or damage sustained by the owner by reason of the detention, and actions for such expense or compensation may be brought against the Secretary of the Board by his official title as if he were a corporation sole.¹⁰ It has been held that compensa-

⁴ Sec. 688 (1).

⁵ *Morrison & Milne v. Massa*, 1866, 5 M. 130, Lord President, at 135.

⁶ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 57), sec. 459.

⁷ Merchant Shipping Act, 1894, *supra*, sec. 462; Merchant Shipping Act, 1897 (60 & 61 Vict. c. 59), sec. 1 (2); Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), secs. 2, 6, 85, Second Schedule.

⁸ Merchant Shipping Act, 1894, *supra*, secs. 459-462.

⁹ *Lewis v. Gray*, 1876, 1 C.P.D. 452.

¹⁰ Sec. 460.

tion does not include a claim for injury to the reputation of the shipowner caused by the detention.¹¹ In the case of foreign ships a copy of the order requires to be "forthwith served" on the consular officer of the country to which the ship belongs.¹² It may be served on the Consul by registered letter, and it has been held to be "forthwith served" on him when served on the day after it was served on the master of the ship. Such an order is regular although it bears to proceed under sec. 459 only and makes no reference to sec. 462; since the order is one under the former section the only effect of the latter section is to extend the provisions of the former to foreign ships.¹³ Where a ship is detained as a British ship a contract to transfer her to a foreigner does not destroy her character as a British ship so long as she remains on the register as such, and, accordingly, the subsequent completion of the transfer does not effect her release. It is not, however, the intention of the Act to prevent valid transfers to foreigners taking place after an order for detention has been made, but merely to prevent the subsequent closing of the register effecting her release by altering her character. It is uncertain whether a ship may be detained as a British ship after a transfer to a foreigner has actually taken place in cases where she still remains on the register as British.¹⁴ Where the order of detention of an unsafe ship is final, appeal lies to the Court of Survey,¹⁵ but it is uncertain whether in this event the owner is deprived of his remedy at common law.¹⁶ If the detention is final, or if it appears that a ship provisionally detained was at the time of the detention an unsafe ship, the Board of Trade may recover the expenses of detention and survey from the owner, as salvage is recoverable.¹⁷ The amount of such expenses may be referred to the Auditor of the Court of Session.¹⁸ The offence of proceeding to sea in breach of an order of detention by the Board of Trade may, in the case of a foreign ship, be relevantly libelled with reference to secs. 459 and 692 only, any reference to sec. 462 being unnecessary.¹⁹

¹¹ *Dixon v. Calcraft*, 1892, 7 Asp. M.L.C. 161.

¹² Sec. 462.

¹³ *Larsen v. Hart*, 1900, 2 F. (J.) 54.

¹⁴ *Granfelt & Co. v. Lord Advocate*, 1874, 1 R. 782.

¹⁵ Sec. 459 (d).

¹⁶ *Lewis v. Gray*, 1876, 1 C.P.D. 452.

¹⁷ Sec. 460 (2).

¹⁸ Sec. 460 (3).

¹⁹ *Larsen v. Hart*, 1900, 2 F. (J.) 54.

(c) **Detention for Claims under the Workmen's Compensation Acts.**—The provisions of the Workmen's Compensation Acts, 1906 to 1923, regarding the detention of ships have now been expressly extended to Scotland, and, accordingly, ships whose owners are alleged to be liable to pay compensation may now be detained "without prejudice to any other means of enforcing claims in Scotland" and "with the substitution of references to the Sheriff for references to a judge of any Court of record in England."²⁰ This extension was made in consequence of a decision that under the Act of 1906 the Scottish Courts had no power of detention. In that case it was pointed out that "an order for detention is only in aid of the arbitration and is not part of the arbitration," and that the order is made by the judge, not as arbitrator but in a judicial capacity.²¹ The provisions of sec. 692 of the Merchant Shipping Act, 1894,²² are expressly made applicable, and procedure is regulated by Act of Sederunt. Applications may be made to the Sheriff, and such notice of the application as is practicable requires to be given to the agent of the owner or charterers of the ship, or to the solicitor authorised to act for her owners, charterers, agent, master, or consignee. The order for detention is required to specify the amount for which caution shall be found as a condition of releasing the ship, and if such caution is found the order must be refused. The applicant may be required to find caution for any damage which may be sustained owing to the order, and it may be recalled at any time on good cause shown.²³

(d) **Detention for Injury to Harbour Works.**—Under sec. 74 of the Harbours, Docks, and Piers Clauses Act, 1847,²⁴ which is incorporated in a number of private Acts, harbour authorities may detain vessels for injury to their works, and may retain them in their possession until sufficient security for the injury has been found. Under sec. 56 of the same Act they may detain wrecks to meet the expenses of their removal. It has been held under a private Act in similar terms that this power of detention is a substantive remedy which confers a

²⁰ Workmen's Compensation Acts, 1906 and 1923 (6 Edw. VII. c. 58), sec. 11; (13 & 14 Geo. V. c. 42), sec. 20.

²¹ *Panagotis v. Owners of s.s. "Pontiac,"* 1912, 1 K.B. 74, Cozens-Hardy, M.R., at 76.

²² 57 & 58 Vict. c. 60, 21 (b); Workmen's Compensation Act, 1906, *supra*, sec. 11 (3).

²³ Act of Sederunt, 20th Dec., 1924, sec. 18.

²⁴ 10 & 11 Vict. c. 27.

possessory lien on the detaining authority and authorises detention until compensation for the injury has been made.²⁵

(e) Detention under the Foreign Enlistments Act, 1870.—

Ships may be detained for offences under the Foreign Enlistments Act, 1870.²⁶ Special powers are conferred for the purpose on the "Secretary of State or the chief executive authority"¹ and on local authorities.² In certain events under this statute the ship may be forfeited by decree of the Court of Session in exercise of its Admiralty jurisdiction.³

(f) Detention under the Explosives Act, 1875.—Under the Explosives Act, 1875,⁴ ships containing explosive substances may in certain events be detained by a Court of summary jurisdiction or by order of a Secretary of State.

Execution of Orders of Detention.—Orders of detention either under the Merchant Shipping Act or under the Workmen's Compensation Acts may be executed by "any commissioned officer on full pay in the naval or military service of Her Majesty, or any officer of the Board of Trade, or any officer of Customs, or any British consular officer." The master and owner of any ship which proceeds to sea in breach of such order of detention, and any person who by sending the ship to sea is party or privy to the breach, is guilty of an offence.⁵

(D) PROCEDURE IN CLAIMS BY SEAMEN FOR WORKMEN'S COMPENSATION.

Application of the Workmen's Compensation Act to Seamen.—Seamen are not entitled to claim workmen's compensation as seamen, but merely as workmen of a special class to whom special regulations are applicable. The provisions of the Workmen's Compensation Acts are primarily intended for workers on land, and are not readily adaptable to the case of seamen, more particularly in the event of accidents occurring at sea, in which case it may happen

²⁵ *Mersey Docks and Harbour Board v. Hay*, 1923 A.C. 345, Lord Sumner, at 383.

²⁶ 33 & 34 Vict. c. 90, sec. 21.

¹ Sec. 23.

² Sec. 24.

³ Secs. 19, 23, 30.

⁴ 38 & 39 Vict. c. 17, secs. 87-96.

⁵ Merchant Shipping Act, 1894, *supra*, sec. 692; Workmen's Compensation Act, 1906, *supra*, sec. 11 (3).

that a seaman is sent home while the ship may possibly remain abroad for an indefinite period, or may be lost at sea before the application is made. Seamen, moreover, are entitled to maintenance and to other benefits from their employers which are totally different in character from those provided by the Workmen's Compensation Acts. For these reasons, it has been pointed out that "seamen belong to a wholly different class from the class of men intended to be protected by the Act."⁶ Prior to 1906 seamen were not eligible at all for workmen's compensation, but by the Workmen's Compensation Act of that year, as amended by the Workmen's Compensation Act of 1923, the right of compensation was extended to seamen in certain events. The procedure for enforcing claims by seamen is contained in sec. 7 of the Act of 1906 and the relative Act of Sederunt, 20th December, 1924. If an applicant claims under that section, and fails to show that it is applicable to his case, he cannot at the same time claim under the other provisions of the Act.⁷

Seamen Entitled to Claim.—Under the Act of 1906, in order to qualify for an award, applicants were required to be at once (a) seamen (or masters, or apprentices to the sea service, or apprentices in the sea fishing service), (b) workmen within the meaning of the Act, and (c) "members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner or (if there is more than one owner) the managing owner or manager resides or has his principal place of business in the United Kingdom."⁸ By the Act of 1923 the right of compensation was extended to "any person not being a master seaman or apprentice to the sea service or the sea fishing service employed on board any such ship as is mentioned in sec. 7 of the principal Act, if so employed for the purposes of the ship or of any passengers or cargo or mails carried by the ship, and if he otherwise complies with the provisions of the principal Act defining workman."⁹ By that Act the privileges of the principal Act were also extended to certain share fishermen, subject to such modification as the Secretary of State might provide.¹⁰ A person may be

⁶ *Houlder Line, Ltd. v. Griffin*, 1905 A.C. 220, Lord Macnaghten, at 224.

⁷ *Panagotis v. Owners of s.s. "Pontiac" (No. 2)*, 1911, 5 B.W.C.C. 147.

⁸ Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58), sec. 7 (1) (3).

⁹ Workmen's Compensation Act, 1923 (13 & 14 Geo. V. c. 42), sec. 9 (2) (c).

¹⁰ Sec. 8.

"employed on board" a ship though not actually on board at the moment at which the accident occurred if his duties in certain circumstances take him ashore.¹¹ It is to be assumed that by the expression "managing owner or manager" is meant managing owner or manager at the time when the application is made, since if the ship has been lost prior to this date it would appear that the provision becomes inoperative by reason of the fact that the agency of the managing owner or manager at the date of the accident has been terminated by the loss.¹² It has been held that a member of the crew of a ship who is remunerated by a share of its gross earnings is entitled to compensation¹³; and, on the particular facts of the case, the engineer of a steamship.¹⁴ The question whether a seaman is employed "otherwise than by way of manual labour" in the sense of sec. 13 of the Act of 1906 is determined by the substantial nature of his employment regarded as a whole. *Prima facie* the master of a steam tug is not employed in manual labour, and it has been so held with reference to the facts of a particular case. Each case, however, requires to be judged on its own merits.¹⁵

Persons Liable as Employers.—The question who is the employer of the seaman is also one of fact. Ordinarily he is the owner of the ship on which the seaman is employed, but he may be the charterer of the vessel, but this intention requires to be clearly inferred in the charter party. Thus, where under the charter party the registered owner paid the crew and had the power of their appointment and dismissal, but the possession, control, and management of the vessel passed to the charterer, it has been held that nevertheless the owner remained the employer of the seaman.¹⁶ The fact, however, of hiring and paying the crew is not in itself sufficient to make a person their employer. Thus, in a case where, under a special agreement, the master hired and paid the crew, he was nevertheless merely the agent of the owners.¹⁷ When the vessel is in harbour the employer may be the stevedore.¹⁸

¹¹ *R. v. Lyndoch & Jones*, 1898, 1 Q.B. 61.

¹² *The "City of Agra"*, 1898, P. 198.

¹³ *Clark v. Jamieson*, 1909 S.C. 132.

¹⁴ *A. v. B. & Co.*, 1923, 39 Sh.Ct.Rep. 221.

¹⁵ *Jacques v. Owners of Steam Tug "Alexandra"*, 1921, 2 A.C. 339.

¹⁶ *Mackinnon v. Miller*, 1909 S.C. 373.

¹⁷ *Kelly v. Owners of Ship "Miss Evans"*, 1913, 2 Ir.Rep. 385.

¹⁸ *Pollard v. Goole and Hull Steam Towing Co., Ltd.*, 1910, 3 B.W.C.C. 360.

Court in which Application may be made.—Where the parties reside in different districts, and the accident has occurred at sea, the application requires to be made to the Sheriff Court of the county or district of a county “(a) in which the ship is at the time when intimation or “service of the application is made, provided that such intima- “tion or service is made to or on the master of the ship in the “same county or district of a county; or (b) in which the “managing owners of the ship or some or one of them or the “manager may reside or have a place of business; or (c) in “which the ship is registered.”¹⁹ The two first heads of this provision are obviously inoperative in cases where the vessel has been lost before the application is made, since there could then be no ship within any county or district of a county, and the loss of the vessel would necessarily terminate the agency of the managing owner or manager.²⁰ For this reason the third head has been introduced into the Act. At common law mere registration of a ship in Scotland creates no jurisdiction over a shareholder resident in England.²¹

Notice of Accident and of Claim.—The Act of 1906 provides that “the notice of the accident and the claim for “compensation may, except where the person injured is the “master, be served on the master of the ship as if he were the “employer, but that where the accident happened and the “incapacity commenced on board the ship, it shall not be “necessary to give any notice of the accident.”²² This provision does not render service on the employer incompetent, but it may be made on either the employer or the master, as is most convenient.²³ Service on the master does not in itself found any jurisdiction against him, and, if the claim is made against the employer alone, does not render the master liable for compensation.²⁴ Accidents occurring ashore, and those in which the incapacity commenced ashore, are not excluded from the provisions of the Act,²⁵ but in their case notice of the accident is necessary. In a case where incapacity had commenced after discharge of the seaman, and in his release of

¹⁹ Act of Sederunt, 20th Dec., 1924, sec. 4 (3).

²⁰ Cf. *The “City of Agra,”* 1898, P. 198.

²¹ *Anderson v. Sillars*, 1894, 22 R. 105.

²² Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58), sec. 7 (1) (a).

²³ *The “Rizel,”* 1912, P. 99.

²⁴ *Manderson v. Woods, Taylor & Brown*, 1913, 30 Sh.Ct.Rep. 49.

²⁵ *R. v. Lyndoch & Jones*, 1898, 1 Q.B. 61.

claims against the master and owner he had expressly excepted claims for workmen's compensation, it was held that such exception did not operate as notice of the claims under the Act.¹

Industrial Disease Contracted at Sea.—The Acts make no express provision for the case of the contraction of industrial disease at sea. The Act of 1906 provides that in applications on the ground of disablement from industrial disease a certificate from the certifying surgeon "for the district in which "a workman is employed" must be produced as a condition precedent of compensation.² Where a workman whose home was in Liverpool contracted an industrial disease at sea, and on his return obtained a certificate from the certifying surgeon of the Liverpool district, it was held that he had not complied with this provision of the Act, and that, since there was no district in which he was employed when he contracted the disease, he could not successfully make a claim.³ This decision, therefore, entirely excluded the case of industrial disease contracted at sea from the provisions of the Act. By the Act of 1923, however, the employer may, by agreement which may be recorded, dispense with the certificate of the certifying surgeon.⁴ By entering such an agreement, therefore, it appears that a seaman may preserve his right of compensation for industrial disease even if contracted at sea.

Time within which Claim may be Brought and Proof of Claim.—The period within which claims may be brought may be extended in certain circumstances. In the event of the death of an injured seaman, the claim for compensation may be made at any time within six months after news of the death of the seaman is received by the claimant.⁵ For the purpose of claims by dependants where the seaman has been lost with his ship, the loss of the vessel may be proved in the same manner as in the case of claims for recovery of wages. Accordingly, in such proceedings the ship is deemed to be lost with all hands on board twelve months after leaving a port of departure unless heard of in the interval. The loss is deemed to have occurred "either immediately after the time she was last heard of or at "such later time as the Court hearing the case may think pro-

¹ *Harper v. Harper*, 1916, 2 K.B. 811.

² Workmen's Compensation Act, 1906, *supra*, sec. 8 (1) (i).

³ *Antes v. Black & Co.*, 1909, 2 K.B. (C.A.) 529.

⁴ Sec. 13.

⁵ Workmen's Compensation Act, 1906, sec. 7 (1) (b).

“bable.”⁶ Proceedings for the recovery of compensation in such circumstances are maintainable if the claim is made “within eighteen months of the date at which the ship is “deemed to have been lost with all hands.”⁷ It has been observed, however, that it is not necessary to wait twelve months before instituting proceedings if other evidence of death is available, since the provision is intended to facilitate and not to limit claims by dependants.⁸ Depositions may be taken abroad where an injured seaman is left behind abroad, and are admissible in evidence as provided by the Merchant Shipping Act, 1894.⁹

Scale and Conditions of Compensation.—Provision is expressly made for the avoidance of the overlapping of benefits owing to the applicant being at once entitled to maintenance as a seaman and to compensation as a workman, and it has been observed that “. . . the right to compensation for accidental injury . . . begins when the injured seaman “ceases to be entitled to maintenance. It is clear that compensation is to begin exactly, where the right to maintenance “ends.”¹⁰ Under the Merchant Shipping Acts, in certain cases of injury to or illness of the seaman, the owner of the ship is liable for the expenses of his medical attendance and of his maintenance “until he is cured, or dies, or is returned “to a proper return port,” and for “in the case of death the “expenses (if any) of his burial.”¹¹ In the case of the death of a seaman in such circumstances, leaving no dependants, no compensation is payable if the owner of the ship is liable under these provisions to pay the expenses of his burial¹²; nor is any weekly payment due for the period during which the owner is liable to defray the expenses of his maintenance.¹³ The opinion has been expressed that the master has a duty at common law to provide medical attendance for a seaman injured in the service of the ship, and it has been held that the obligation imposed on the owner under the Merchant Shipping

⁶ Merchant Shipping Act, 1894, sec. 174 (2).

⁷ Workmen's Compensation Act, 1906, sec. 7 (1) (9).

⁸ *Maginnis v. "Carlingford Lough" S.S. Co., Ltd.*, 1909, 43 Ir. L.T.R. 123.

⁹ Merchant Shipping Act, 1894, secs. 691, 695; Workmen's Compensation Act, 1906, sec. 7 (1) (c).

¹⁰ *M'Dermott v. Owners of s.s. "Tintoretto"*, 1911 A.C. 35, Lord Loreburn, L.C., at 39.

¹¹ Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), sec. 34 (1), as amended by Merchant Shipping Acts (Amendment) Act, 1923 (13 & 14 Geo. V. c. 40), sec. 1.

¹² Workmen's Compensation Act, 1906, sec. 7 (1) (d).

¹³ Workmen's Compensation Act, 1906, sec. 7 (1) (e).

Acts to provide such attendance imposes also a duty on the master to carry out the obligation as his representative.¹⁴ The provision that "in fixing the amount of the weekly payment regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity," which occurs in Schedule I. (3) of the Workmen's Compensation Act, 1906, is introduced to prevent the workmen being paid twice over in respect of the same incapacity. It must be construed with some limitation, and in its application is confined to those "payments, allowances, or benefits" which are received in respect of the incapacity, and of that period of it which is covered by the compensation. Accordingly, in assessing the compensation of a seaman, deduction should be made in respect of wages paid between the date of the accident and his discharge, and in respect of his medical attendance during his incapacity, and his maintenance and return to a proper return port in terms of the Merchant Shipping Acts.¹⁵ Similarly, a deduction should be made in respect of treatment in hospital paid for by his employer.¹⁶ Where the seaman himself makes his return to a proper return port impossible, as by desertion, the liability of the owner under the Merchant Shipping Acts at once terminates and his liability as an employer for compensation commences.¹⁷ It is not, however, the intention of the Act to suspend the right to compensation during maintenance, but merely the right to its payment, and, accordingly, proceedings to establish liability for compensation may be brought as soon as evidence is available, and a declaration of the liability of the employer obtained.¹⁸

Effect of Release of Claims against Master or Owner of Ship.—A release of claims against the master or owner by a seaman on discharge "in respect of the past voyage or engagement," as provided by the Merchant Shipping Act,¹⁹ does not operate as a release of all claims to workmen's compensation. Such a release is given merely "with reference to the rights arising out of the particular contract with the seaman. The release, which is in statutory form, governs the

¹⁴ *Taylor v. Hill*, 1900, 7 S.L.T. 318.

¹⁵ *M'Dermott v. Owners of s.s. "Tintoretto"*, 1911 A.C. 35.

¹⁶ *Soronsen v. John Gaff & Co.*, 1912 S.C. 1163.

¹⁷ *Mohad v. Anchor Lines, Ltd.*, 1922 S.C. (H.L.) 53.

¹⁸ *Ashrody v. Owners of s.s. "City of Edinburgh"*, 1920, 1 K.B. 301.

¹⁹ Sec. 136.

"rights of the parties in relation to the particular work or "the particular rights arising out of the seaman's contract." Accordingly, a claim for compensation in respect of an accident occurring during a voyage, but not causing incapacity until after discharge of the seaman, is not barred by it.²⁰

Modification of Owner's Right to Limit Liability.—The limitation of liability allowed by the Merchant Shipping Act, 1894, in certain cases of loss of life, injury, or damage,²¹ does not apply to sums payable by the owner as employer by way of compensation, but does apply to the amount recoverable by the employer by way of indemnity under the section of the Workmen's Compensation Act which relates to remedies both against employer and stranger as if the indemnity were damages for loss of life or personal injury.²² Thus, if a seaman is injured through the collision of his vessel with another vessel which is in fault, he can recover full compensation from the owner of his own vessel as his employer. The owner can then recover indemnity from the owner of the vessel which is in fault, but in this case the amount is limited as if it were damages under sec. 503 of the Merchant Shipping Act, 1894.²³ The owner can recover the indemnity from the owner of the wrongdoing ship in the same manner as if it was damage by collision.²⁴ A similar limitation applies to the indemnity recoverable from "the owners, builders, or other parties interested in" a ship from its launching to its registration.²⁵ Other cases where an indemnity may be recoverable are where the vessel is undergoing repairs by a shipwright or is in the hands of stevedores.

Competent Defences: Seen Danger.—In general, the same defences are competent in a claim by a seaman as in claims by other persons. The defence of "seen danger" is, however, in general excluded, since the nature of a seaman's employment is such that it is impossible to avoid such dangers as ordinarily arise on board ship.¹ It is possible, however, that the plea will be upheld where the seaman was aware of the parti-

²⁰ *Buls v. Owners of s.s. "Teutonic,"* 1913, 3 K.B. 695, Kennedy, L.J., at 699.

²¹ Sec. 703.

²² Workmen's Compensation Act, 1906, sec. 7 (1) (f).

²³ Cf. *Davidson v. Hill*, 1901, 2 K.B. 106.

²⁴ *The "Annie,"* 1909, P. 176.

²⁵ Merchant Shipping (Liability of Shipowners) Act, 1898 (61 & 62 Vict. c. 14), sec. 1.

¹ *Rothwell v. Hutchison*, 1886, 13 R. 463.

cular danger from which the accident arose before entering the employment, as where he has, knowingly, taken service on a ship which is unclassified at Lloyd's.²

Interruption of Employment.—The circumstances in which a seaman's employment may be deemed to have been interrupted by reason of his temporary absence from the ship are substantially the same as in the case of temporary absence from work on land.³

² *Wallace v. Culter Paper Mills*, 1892, 19 R. 915, Lord M'Laren, at 920.

³ Cf. *Jackson v. General Steam Fishing Co.*, 1909 S.C. (H.L.) 37; *Officer v. Davidson & Co.*, 1918 S.C. (H.L.) 66; *Craig v. Owners of s.s. "Calabria,"* 1914 S.C. 765; *M'Lean v. David MacBrayne, Ltd.*, 1916 S.C. 338.

PART II.
PRACTICE APPLICABLE TO PARTICULAR
CLAIMS.

CHAPTER I.
POSSESSION AND CO-OWNERSHIP.

Nature of Property of Ships.—Property in ships differs in many respects from property in other corporeal moveables. Thus, it is a universal rule of maritime law that a written instrument is necessary to transfer their ownership,¹ and it has been pointed out that “a ship is not like an ordinary personal chattel; it does not pass by delivery, nor does the possession of it prove the title to it. There is no market overt for “ships.”² Property in British ships is subject to special regulations. They can only be owned by “natural-born British “subjects” or persons possessing certain special qualifications.³ With certain exceptions, they require to be registered, and a certificate that this has been done is necessary before they can be recognised as British ships and become entitled to the privileges of such.⁴ Moreover, property in ships is commonly divided into shares and held in common by a number of co-owners. In the case of British ships the property is divided into 64 shares, which may be held by separate individuals.⁵

Ownership.—In the case of ships, the expression “owner” is used in a variety of senses, and may even be applied at the same time to different persons holding different rights in the vessel. With reference to its use in the Merchant Shipping Act, 1894, it has been observed that “the word ‘owner’ is used

¹ *The “Sisters,”* 1804, 5 C. Rob. 155, Lord Stowell, at 159.

² *Hooper v. Gumm; M’Lellan v. Gumm*, 1867, 2 Ch. Ap. 282, Turner, L.J., at 290.

³ Merchant Shipping Act, 1894, sec. 1.

⁴ Secs. 2, 3.

⁵ Sec. 5.

“in very many sections. Sometimes it means registered owner, which is indeed the primary sense. Sometimes it must also include beneficial owner. And in other parts it seems to me that it must of necessity also include a charterer by demise who has control of the ship and navigates her with his own master and crew.”⁶

(a) **Registered Ownership.**—Formerly registered ownership was the only form of ownership of a British ship which was recognised in law. Now, however, the policy of the Legislature is to give full recognition to beneficial ownership so far as may be consistent with the preservation of the system of registration for the aims which it is intended to secure. It has been pointed out that registration serves two purposes of public interest. “There are two points of public policy which may be suggested in these acts relating to shipping: the one a policy regarding the interests of the nation at large, relating to the question who shall be entitled to the privileges of the British flag . . . ; the other policy being similar to that which gave rise to the Acts for the registration of titles to land—the object being to determine what should be a proper evidence of title in those who deal with the property in question.”⁷ Accordingly registration has been preserved for the following purposes:—(1) To provide a clear and complete title of property in British ships which, in the absence of contrary evidence, may be presumed to be that of true ownership; (2) to exclude unqualified persons entirely from the ownership of such ships; and (3) to provide, by entry in the register, a rapid and convenient method of transfer of property in them by qualified persons *inter se*. In order to give effect to these purposes, it is necessary to retain certain restrictions on the free operation of beneficial ownership. Thus, the names of persons unqualified to own British ships cannot appear on the register,⁸ nor can they acquire a legal or beneficial interest in them,⁹ and if property passes by operation of law to them the Court may prohibit its transmission.¹⁰ The registered owner may dispoise the ship absolutely to such persons as are qualified and give a valid receipt for it, and, since this power

⁶ *The Hopper* No. 66, 1908 A.C. 126, Lord Loreburn, at 130.

⁷ *Liverpool Borough Bank v. Turner*, 1860, 29 L.J. Ch. 827, Wood, V.C., at 830.

⁸ Merchant Shipping Act, 1894, sec. 1.

⁹ Sec. 9 (v).

¹⁰ Secs. 28-30.

would be defeated if trusts were allowed to appear on the register, they are entirely excluded from it.¹¹ These exceptions, however, do not affect the general principle that interests arising under contract or other equitable interests in a vessel may be enforced.¹² Registration is merely *prima facie* evidence of ownership, which may be rebutted by proof that the true ownership is elsewhere.¹³

(b) **Ownership by Demise.**—The person to whom a ship has been demised by charter acquires many of the rights and liabilities of ownership and may properly be spoken of as owner, and it has been observed that “when there is such a person, “and that person appoints the master, officers, and crew of the “ship, pays them, employs them, and gives them the orders “and deals with the vessel in the adventure, during that time “all those rights which are spoken of as resting upon the “owner of the vessel rest upon that person who is for those “purposes during that time in point of law to be regarded as “the owner.”¹⁴ In each case it is a question of intention as expressed in the charter party whether a demise has taken place.¹⁵

(c) **Beneficial Ownership.**—Beneficial ownership is the interest in a ship of a person who has acquired rights “arising “under contract or other equitable interests” which “may be “enforced by or against owners and mortgagees of ships in “respect of their interest therein in the same manner as in “respect of any other personal property.”¹⁶ Thus, a charterer may be a beneficial owner, or a mortgagee, or generally any person with an equitable interest. The beneficial owner, equally with the registered owner, is subject to all the pecuniary penalties imposed on “owners” by the Merchant Shipping or other Acts, and proceedings may be taken against either or both of them with or without joining the other.¹⁷

Possession.—In the case of ships the right of possession is frequently separate from that of ownership. In the majority

¹¹ Sec. 56.

¹² *Watson v. Duncan*, 1879, 6 R. 1247, Lord President, at 1251.

¹³ *Duffus v. Lawson & Mackay*, 1857, 19 D. 430.

¹⁴ *Baumwoll Manufactur von Carl Scheibler v. Furness*, 1893 A.C. 8, Lord Herschell, L.C., at 17.

¹⁵ Bell, Prin., sec. 405; *Mitchell v. Burn*, 1874, 1 R. 900, Lord Ordinary, at 903.

¹⁶ Sec. 57.

¹⁷ Sec. 58.

of cases no doubt they coincide, and the right of possession rests with the owner, whether he be the registered owner or a charterer by demise. In certain cases, however, they may be entirely separate, as where co-owners are at variance regarding the employment of the ship. The majority of co-owners are entitled to the possession of the ship, they may appoint the master,¹⁸ and may determine her employment.¹⁹ Thus they may send her upon a voyage disapproved of by the minority, who have then no remedy except the sale of their shares or an action of set and sale. For most purposes the person who is in lawful possession of a ship has all the rights and liabilities of ownership. In Scots law such a person is known as the exercitor, who is "the person who employs a ship in the way of trade on his own account, whether he be himself the owner or whether he freight her from the owner."²⁰ In certain cases the beneficial owner may be the exercitor. Thus the exercitor may be the trustee in the sequestration of a bankrupt owner.²¹ Similarly, a mortgagee, by taking possession, acquires the position of an owner, and thus of an exercitor to the extent necessary to secure his debt.²²

"Ship."—The meaning of the term "ship" is in each case a question of fact.²³ For the purposes of the Merchant Shipping Act it includes "every description of vessel used in navigation not propelled by oars."²⁴ For the purposes of registration and for limitation of liability its meaning has now been extended by the Merchant Shipping Act, 1921,²⁵ to include "every description of lighter, barge, or like vessel used in navigation in Great Britain, however propelled, provided that a lighter, barge, or like vessel used exclusively in non-tidal waters other than harbours shall not, for the purposes of this Act, be deemed to be used in navigation." The provisions of the Act of 1894 regarding registration apply exclusively to British ships, but the term "British ship" is nowhere defined, either in the Act or elsewhere. It is not necessary, however, in order to be a British

¹⁸ Bell, *Comm. i.*, 506.

¹⁹ Stair, *Inst.*, 1, 16, 4; *Montgomery v. Forrester & Co.*, 1791, M. 14583.

²⁰ Erskine, *Inst.*, 3, 3, 43.

²¹ *Mackessack v. Molleson*, 1886, 13 R. 455.

²² *Keith v. Burrows*, 1877, 2 A.C. 636, Lord Cairns, L.C., at 646.

²³ *Oakes v. Monkland Iron Co.*, 1884, 11 R. 579; *The Salt Union v. Wood*, 1893, 1 Q.B. 370.

²⁴ Sec. 742.

²⁵ 11 & 12 Geo. V. c. 28, sec. 1 (1).

ship that a ship should be registered as such. It has been observed that "if she belongs absolutely and entirely to English owners, she is an English ship before she is registered, and whether she is registered or not," but unless she is registered she cannot obtain the privileges conferred on British ships by the Merchant Shipping Act.²⁶ The Act is only intended to apply to ships intended to be the property of British owners, but a ship built in a British shipyard for the purpose of being sold to foreign owners is in fact a British ship until the property has passed, although it is not a British ship in the sense of the Merchant Shipping Act.¹ British ships registered out of the United Kingdom and foreign ships may be exempted by Order in Council where, within a port of the United Kingdom, from the provisions of the Merchant Shipping Acts, provided that they are subject to equivalent provisions by their own municipal law.²

Acquisition of Property in Ships.—Property in ships may be acquired by building, by transfer by the owner, by transmission by operation of law, or by capture and condemnation.

(a) **By Building.**—The person who builds a ship for his own use is himself the owner. If the vessel is built under contract by one person for the use of another, that being a contract for the sale of goods, the passing of property is determined by the intention of the parties.³ To enable the owner to acquire the privileges of ownership of a British ship, it is necessary for the vessel to be registered in his name, for which purpose he requires to produce a declaration of ownership and the builder's certificate.⁴ The nature of the contract of shipbuilding is considered elsewhere.⁵

(b) **By Transfer.**—It is a universal rule of maritime law that the ownership of ships can only be transferred by writing.⁶ The transfer of British ships is subject to special regulations. A registered British ship or share therein can only be

²⁶ *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*, 1883, 10 Q.B.D. 521, Brett, L.J., at 536.

¹ *Union Bank of London v. Lenanton*, 1878, 3 C.P.D. 243, Cockburn, C.J., at 247.

² Merchant Shipping (Equivalent Provisions) Act, 1925 (15 & 16 Geo. V. c. 37).

³ *Barday, Curle & Co v. Sir James Laing & Sons, Ltd.*, 1908 S.C. 82.

⁴ Merchant Shipping Act, 1894, secs. 9, 10.

⁵ *Supra*, p. 64.

⁶ *Schultz v. Robinson & Niven*, 1861, 24 D. 120.

transferred to a person qualified to own such a ship, and the transfer requires to be by bill of sale in a prescribed form.⁷ A mere error, however, in the mode of execution of the bill of sale may be remedied by the Court, which may ordain the registrar to register a second bill of sale in proper form.⁸ Owing, however, to the provisions of the Act regarding the enforcement of equitable interests, contracts of sale are in a different position, and may be enforced in any form.⁹ For this reason it has been held that writing is not essential to a contract for a sale of shares in a ship.¹⁰ Transfers which are not in prescribed form, and transfers to persons not qualified to own British ships, destroy the vessel's character as British. A fictitious sale to a foreigner and the vessel's transfer to a foreign registry for the purpose of evading a Board of Trade survey is a fraud on the public policy of the country, and may be reduced.¹¹ Similarly, a transfer to a conjunct and confident person may be reduced as in fraud of creditors under the Act 1621, c. 18.¹² The proper price of a ship is its market value and not the cost of replacement. If an insolvent person buys a ship for a price grossly in excess of this amount, the sale may be reduced *quoad* the excess as a gratuitous alienation.¹³ Where the registered owner desires to sell the ship or share "at any place out of the country in which the port of registry of the ship is situate," the power of sale may be conferred by a certificate of sale.¹⁴ The purpose of the provision and the rules applicable are similar to those in the case of certificates of mortgage.¹⁵

(c) **By Transmission.**—Similar principles apply to transmissions of property in ships or shares. The transmission of the property in a registered British ship or share therein to a person qualified to own such a vessel, "on the marriage, death, or bankruptcy of any registered owner, or by any lawful means other than by a transfer under this Act," requires to be in prescribed form.¹⁶ The expression "by any lawful means

⁷ Secs. 24-26, Merchant Shipping Act, 1804.

⁸ *Duthie v. Aiken*, 1893, 20 R. 241.

⁹ *Batthyany v. Bouch*, 1881, 50 L.J. Q.B. 421.

¹⁰ *M'Connachie v. Geddes*, 1918 S.C. 391.

¹¹ *Hutchinson & Co. v. Aberdeen Sea Insurance Co.*, 1876, 3 R. 682.

¹² *Bell v. Gow*, 1862, 1 M. 183.

¹³ *Abram S.S. Co., Ltd. v. Abram*, 1925 S.L.T. 243.

¹⁴ Secs. 29-46.

¹⁵ See *infra*, p. 147.

¹⁶ Sec. 27, Merchant Shipping Act, 1894.

"other than by a transfer under this Act" refers to transmissions by operation of law unconnected with the direct act of the party to whom the property is transmitted.¹⁷

(d) **By Capture and Condemnation.**—Ships captured from an enemy in time of war may be condemned to the captor by a sentence of condemnation. This procedure is only competent in the Admiralty Division of the English High Court sitting in Prize, and there is therefore no jurisdiction in the Scottish Courts.

Statutory Jurisdiction of Court of Session: (a) To Order Sale.—When a ship registered in Scotland has been transmitted to an unqualified person the Court of Session may exercise a statutory jurisdiction of an equitable character. Such transmissions are, of course, illegal, and cannot receive effect. At the same time, it would be inequitable to ignore entirely rights arising under them. Accordingly, "on application by or on behalf of the unqualified person, the Court may order a sale of the property so transmitted, and direct that the proceeds of the sale after deducting the expenses thereof be paid to the person entitled under such transmission or otherwise as the Court directs."¹⁸ The order of the Court may be either for a sale in open market or for a particular agreed-on sale, in pursuance of a previous arrangement between parties.¹⁹ The jurisdiction being an equitable one, "the Court may require any evidence in support of the application they think requisite, and may make the order on any terms and conditions they think just, or may refuse to make the order, and generally may act in the case as the justice of the case requires."²⁰ If the application is not made within a specified period, or if the order is refused, the ship or share therein so transmitted becomes subject to forfeiture under the Act.²¹ Where the Court, either under the above provisions "or otherwise," orders the sale of any ship or share therein, it is provided that "the order of the Court shall contain a declaration vesting in some person named by the Court the right to transfer that ship or share, and that person shall thereupon be entitled to transfer the ship or share in the

¹⁷ *Chasteauneuf v. Capeyron*, 1882, 7 A.C. 127, at 134.

¹⁸ Sec. 28 (1), Merchant Shipping Act, 1894.

¹⁹ *Re The "Santon"*, 1878, 26 W.R. 810.

²⁰ Sec. 28 (2).

²¹ Sec. 28 (3) (4).

“ same manner and to the same extent as if he were the registered owner thereof.”²² The words “ or otherwise ” provide for the case of transfers by the direct act of the transferor. There appears to have been no procedure under this provision in Scotland.

(b) **To Prohibit Transfer.**—The Court of Session may also, “ if it think fit (without prejudice to the exercise of any other power of the Court), on the application of any interested person, make an order prohibiting for a time specified any dealing with a ship or any share therein.”²³ It has been held that this provision is not of general application, but is to be read in conjunction with the two sections which precede it as dealing only with the transmission of ships or shares therein to unqualified persons. On this ground it has been held that an application by a personal creditor of an owner to prevent him selling or mortgaging his share is incompetent. One of the judges, however, expressly reserved opinion on the meaning of the section, holding that in a case such as that under consideration the common law of Scotland provided the remedy of “ preventative diligence by arrestment and inhibition in security.”²⁴ Such a remedy can, of course, only be obtained if the vessel is within the jurisdiction of the Court, and is therefore narrower than that provided by the Act, which applies to any ship registered in Scotland. In a subsequent case a petition by a part owner to have a co-owner restrained from dealing with his joint interest or share in the ship by way of sale, mortgage, or otherwise was also held incompetent on the same grounds, but in a dissenting judgment the opinion was expressed that the section should be read in conjunction not with the two preceding sections, but with sec. 56, which confers on the registered owner the absolute power of disposal of the ship or share in the manner provided by the Act, and that it was therefore intended for the benefit of any person with any beneficial interest in the ship which was not directly recognised under the Act, and, further, that, though a personal creditor of an owner being no more interested in the ship than in any other personal property of his debtor had no such interest, a part owner had, and was entitled to proceed under the provision.²⁵ A petition by

²² Sec. 29.

²³ Sec. 30.

²⁴ *Roy v. Hamiltons & Co.*, 1867, 5 M. 573, Lord Curriehill, at 577.

²⁵ *M'Phail v. Hamilton*, 1878, 5 R. 1017, Lord Shand, at 1020.

the trustee on the sequestrated estate of a part owner to have the co-owners restrained from dealing with his share has also been held incompetent, but, as no opinions were expressed, it is uncertain whether the Court proceeded on the terms of the provision or not.²⁶ In England the Court has on two occasions sustained applications by purchasers of a ship whose payments have fallen into arrears to restrain the seller from transferring the ship to third parties, but it does not appear in either case whether the order of the Court was made under this provision or under its inherent powers.²⁷ The jurisdiction is an equitable one, and "the Court may make the order on any terms " or conditions they think just, or may refuse to make the " order, or may discharge the order when made with or without costs, and generally may act in the case as the justice of " the case requires."²⁸ In Scotland procedure is by petition.²⁹

Procedure in Claims of Possession.—In claims of possession it is necessary that the ship herself, that is, the subject of the claim, should be validly arrested, since otherwise the defender is at liberty to remove the vessel from the jurisdiction, and any pecuniary remedy which the Court may be able to give may be inadequate. Difficulty, however, in executing a valid arrestment may arise from the fact that in the case of ships possession and ownership are frequently separated, and that the person from whom possession is sought may not be, in fact, the owner. This is material where jurisdiction is sought to be founded on arrestment *ad fundandam jurisdictionem*, which merely founds jurisdiction against the true owner; accordingly an arrestment *ad fundandam jurisdictionem* of the ship may fail to found any ground of jurisdiction over the person who is, in fact, in possession of the vessel, as where he is a mortgagee in possession.³⁰ For the same reason arrestment on the dependence of the action may fail to attach the vessel, which may then be removed outwith the jurisdiction and the remedy lost. Even in cases where the defender is, in fact, a true owner, it may appear in the course of the proceedings that he is only a part owner, and accordingly the decree of the Court will merely transfer his interest in the vessel, such as it is, and

²⁶ *Urquhart v. Stewart*, 1882, 10 S.L.R. 472.

²⁷ *Ship "Isis," ex parte Baker*, 1868, 3 M.L.C. (O.S.) 52; *The "Horlock,"* 1877, 2 P.D. 243.

²⁸ Sec. 30.

²⁹ *M'Phail v. Hamilton*, *supra*.

³⁰ *Jones v. Samuel*, 1862, 24 D. 319.

will not affect the vessel herself. For these reasons, in cases of doubt an arrestment *in rem* is appropriate on which a decree *in rem* against the ship herself may proceed, and possession may be effectually given to the pursuer.³¹ In form the action is one for declarator of the right of possession and for delivery of the vessel.³²

The summons should also contain conclusions for delivery of the ship's papers, which are necessary for her navigation and employment. Unlawful detention of the certificate of registry of a British ship is a penal offence.³³ It has been observed that the remedy of an action *in rem* "is obviously an appropriate one in the case of a plaintiff who has a right of property or other real right in the ship, or a claim of debt secured by a lien which the law recognises."³⁴ In such cases the usual practice of releasing the ship on security need not necessarily be followed, since the release, by enabling the vessel to be removed from the jurisdiction, may prevent the decree which is sought being enforced. Security in such circumstances obviously cannot be a proper *surrogatum* for the ship. If, however, the claimant consents, the ship may be released for a limited period under a bond of caution for her safe return within the jurisdiction. In such a case the caution should be sufficient to cover the earnings of the vessel while in the possession of the defender.

Co-ownership.—A ship is generally the property of a number of co-owners. By the Merchant Shipping Act the property in a British ship is divided into sixty-four shares, which, subject always to the special provisions of the Act regarding joint ownership and ownership by transmission, and to the beneficial titles of persons or companies represented by or claiming under or through any registered owner or joint owner, may be held at the same time by any number of registered owners not exceeding sixty-four individuals. Ownership of fractional parts of a share is not recognised, but a number of persons, not exceeding five, may be registered as joint owners of a ship or share therein, and are for that purpose regarded as constituting one person only, and cannot dispose in severalty of the interest in respect of which they are registered. A corporate body is

³¹ *Clan Line Steamers, Ltd. v. "Earl of Douglas" S.S. Co., Ltd.*, 1913 S.C. 967.

³² *Jones v. Samuel*, 1862, 24 D. 319.

³³ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 15.

³⁴ *The "Heinrich Bjorn"*, 1886, 11 A.C. 270, Lord Watson, at 276.

regarded as a single person, and appear on the register in its corporate name.³⁵

Co-owners : (a) As Joint Owners of Common Property.—

The co-owners of a ship are joint owners of common property, and they are at the same time generally joint adventurers in a common enterprise, but not necessarily so merely by reason of their co-ownership.¹ In every case it is a question of circumstances in which of these two capacities their legal relationships fall to be considered. As joint owners of common property, they are *pro indiviso* proprietors of the property which they hold in common. The right of each part owner is separate and distinct, and descends as such to his representatives. It may be assigned without the consent of the other part owners, and may be attached for the personal debts of the part owner, but not for those of the ship, except in so far as these have directly or by implication been authorised by him.² At common law the consent of all joint owners of common property is "requisite in the management, alteration, or disposal " of the subject."³ In the case of ships, however, this general principle is subject to modification. For all practical purposes, both in law and in fact, the management of a ship is confined to its active employment in trade, in which case all the part owners, in so far as they consent to her employment, are in the position of joint adventurers and management by an accredited agent known as the managing owner or ship's husband is imposed by statute.⁴ The mandate of the ship's husband is sufficiently wide to cover the execution of minor repairs and alterations to the vessel, and it is only in the event of unusual repairs or elaborate structural alterations being necessary that the consent of the individual part owner is required to be obtained.⁵ In strict law, also, although a part owner is entitled to withhold his consent from a proposed employment of the vessel and to invoke the equitable jurisdiction of the Court in his favour by means of an action of set and sale, in fact this course is seldom taken. It is now a general practice to regard the possession of a majority of the shares as carrying with it the control of the vessel for all purposes, and in conse-

³⁵ Sec. 5.

¹ *Logan v. Brown*, 1824, 3 S. 12.

² Bell, Comm. ii., 655.

³ Bell, Prin., sec. 1072.

⁴ Merchant Shipping Act, 1894, sec. 59.

⁵ *Steele & Co. v. Dixon*, 1876, 3 R. 1003.

quence majority shares command a higher price in the market. It has long been recognised in law that the appointment of the master rests with the owners of majority shares.⁶

(b) **As Joint Adventurers.**—As soon as the vessel comes to be actively employed in trade, the co-owners, in so far as consenting to the employment, acquire the position of joint adventurers. Joint adventure has been described as a limited partnership, “and may take place either with unknown and dormant partners or with partners who are known, but who use no firm or social name. It is limited to a particular adventure or voyage or course of trade. To the extent to which it reaches it differs not in its effects from proper partnership; but there is no firm and no general responsibility beyond the limited agreement of the parties.”⁷ Thus, in many cases the co-owners of a ship may be in ignorance who in fact their partners are, as in the case of a part owner having sold his share without disclosing the fact to his co-owners.⁸ Moreover, the joint adventure is resolved into its elements immediately on its termination, and does not subsist as a separate person for the purpose of winding up, and each joint adventurer may sue the others in his own name for their intromissions with the common funds.⁹ The essential feature of the relationship is that “the limits of the contract are fixed by the actual agreement between the parties.”¹⁰ It has been suggested that joint adventure is undistinguishable from proper partnership,¹¹ but it has been recognised as a distinct relationship by very recent authority, it being observed that “joint adventure is just a partnership limited to a particular season or a particular enterprise in which there is either no power in the partners to bind one another or such power is limited to the particular adventure.”¹² Within the joint adventure the majority of co-owners may direct the employment of the ship, and may, if necessary, terminate the adventure, since from the nature of the society “no law or contract could bind the majority to continue to the hazard of their ruin.”¹³ The minority may terminate the adventure by an action of set and

⁶ Bell, Comm. i., 506.

⁷ Bell, Comm. ii., 649.

⁸ *Wilson v. Dickson*, 1818, 2 B. & Ald. 2, Bayley, J., at 12.

⁹ *Pyper v. Christie*, 1878, 6 R. 143, Lord Justice-Clerk, at 144.

¹⁰ Bell, Comm. ii., 649.

¹¹ Bell, Prin., sec. 392.

¹² *Clark v. Jamieson*, 1909 S.C. 132, Lord MacLaren, at 138.

¹³ *Montgomery v. Forrester & Co.*, 1791, M. 14583.

sale. The owners of ships given out to other persons on the "deal" or share system, by which they are entitled to a share of the profits, are joint adventurers with them.¹⁴ For the purpose of determining in any particular case whether the relationship of the co-owners is to be considered as that of joint adventure or of joint ownership of common property the manner in which a part owner has acquired his share may be material. If he has acquired it in a voluntary manner by direct transfer, there is a presumption that the agreement of joint adventure as subsisting at the moment of transfer has been adopted by him, and this presumption holds even if the transfer takes place in the course of a voyage,¹⁵ but the presumption may be rebutted. If, however, he has acquired it involuntarily, as by transmission on the marriage, death, or bankruptcy of the previous owner, or otherwise by operation of law, no such presumption arises, and he succeeds merely to the position of joint owner of common property.¹⁶ Provision is made in the Merchant Shipping Act for declaration being made and actions being taken on behalf of infants and other incapable persons when such are required in connection with the registry of the ship or share.¹⁷

Co-ownership by Purchase of Shares.—The rights and obligations of a purchaser of shares in a vessel are therefore in each case a question of circumstances. In consequence of his purchase he succeeds to the position of part owner of the vessel, but not necessarily to that of joint adventurer in the enterprise in which it is at the time engaged. It has been observed that joint adventure "is not to be inferred from joint ownership in a ship unless there has been participation in the mercantile employment of the ship in which the joint adventure is said to have consisted."¹⁸ In general, however, there is a presumption that the purchase has been made for the purpose of participating in the adventure, and, accordingly, it has been held that the purchaser is liable on contracts made for the purposes of the voyage in which the vessel is engaged at the time of the purchase, but not on those for previous voyages in whose profits he does not share.¹⁹ Thus, it

¹⁴ *M'Gee v. Anderson*, 1895, 22 R. 274; *Hay & Co. v. Douglas*, 1922 S.L.T. 365.

¹⁵ *The "Vindobala"*, 1887, 13 P.D. 42.

¹⁶ Bell, Comm. ii., 655.

¹⁷ Sec. 55.

¹⁸ Bell, Prin., sec. 392.

¹⁹ *The "Vindobala"*, 1887, 13 P.D. 42.

has been held that he acquires right to the freight from the time that he intimates the purchase to the freighter, and his right cannot be defeated by a claim of retention by the freighter for debts due to him by the seller.²⁰ On similar grounds, if the master in ignorance that a sale has taken place and in his capacity as agent of the owner has contracted for the future employment of the ship, the purchaser is liable on the contract.²¹ If, however, the master, in ignorance of the sale, has pledged the personal credit of the seller, the purchaser cannot then be treated as an undisclosed principal, and incurs no liability.²² Where the purchaser has, prior to the sale, acted as ship's husband, and in that capacity laid in supplies for a voyage to be performed after the date of the purchase, he is liable on equitable grounds to account for his expenditure thereon in so far as he has benefited personally by it, since it was to that extent outwith his mandate as ship's husband.²³ The presumption of joint adventure, however, does not hold if the purchase is merely in security of a debt, and, accordingly, the purchaser is not liable, in such circumstances, for expenditure on repairs and supplies incurred prior to his purchase, even although the latter would be a proper deduction from the gross freight if earned.²⁴ In questions arising from delict it has been held that a purchaser acquires no interest in a ship until the property has actually passed to him, and, accordingly, that he has no title to sue in respect of damage sustained by the ship prior to his purchase, even although he has himself incurred loss by it, and that his radical defect of title is not cured by an assignation of his claims by the vendor after the action has been raised.²⁵

Conjunction of Actions and Title to Sue: (a) Actions by Co-owners.—In claims arising from contract each co-owner, as a joint owner of common property, has a separate and distinct title to sue in respect of his share. In order, however, to relieve the defender of the embarrassment of a large number of separate actions arising from the same event, it is proper that actions by co-owners should be conjoined. The rule, however, is an equitable one, and will not be enforced if it will

²⁰ *Walker v. Dingwall's Trustees*, 1794, Bell's Cases, 34.

²¹ *Mercantile Bank v. Gladstone*, 1868, 3 Ex. 233.

²² *Mackenzie v. Poolley*, 1856, 25 L.J. Ex. 124.

²³ *Robertson v. Dennistoun*, 1865, 3 M. 829.

²⁴ *Carswell & Son v. Finlay*, 1887, 14 R. 903.

²⁵ *Symington v. Campbell*, 1894, 21 R. 434.

operate unjustly to the pursuers.¹ In claims arising from delict similar principles apply. Thus, "the several part owners of a ship make in law but one owner; and, in case of any injury done to the ship by the wrong or negligence of a stranger, they ought regularly to join in an action at law for the recovery of damages, which are afterwards to be divided among themselves according to their respective interests."² The rule, however, in this case also is not invariable, and equitable considerations do not operate in favour of conjunction to the same extent. Moreover, in such claims the common property which forms the bond between the part owners may itself have been destroyed by the event from which the claim arises, as in the case of the loss of the ship by collision. Accordingly, separate actions by individual part owners on delict will more readily be entertained than in the case of contract. At the same time, the Court will exercise its equitable jurisdiction to protect the defender so far as is possible from the expense and inconvenience of an accumulation of actions. "It by no means follows that the defender in any such case will be subjected to the hardship of a number of actions, as the Court can always prevent that hardship—indeed the party himself may do so. He may intimate the action to the other owners, and may protest that he shall not be liable in the expenses of another action, and that a fair trial in the one raised shall determine the value of the vessel and settle the question of liability. Or the Court may direct the pursuer to call the other part owners or to account for their non-appearance."³ Considered as joint adventurers merely, the title and interest of co-owners to sue both on contract and delict is substantially that of partners within the scope of the joint adventure.

(b) Actions against Co-owners.—Similar principles apply to actions against co-owners. On contract as joint owners of common property, they are only liable *pro rata* for expenditure on the ship, unless they have expressly or by implication pledged their personal credit. As joint adventurers their liability is substantially that of partners, with this limitation, that "the limits of the contract are fixed by the actual agreement between the parties; whereas in partnership there is a

¹ *Scotland v. Walkinshaw*, 1820, 9 S. 25; *Lawson v. Leith and Newcastle Steam Packet Co.*, 1850, 13 D. 175.

² *Abbott on Shipping*, 14th edn., 146.

³ *Lawson v. Leith and Newcastle Steam Packet Co.*, *supra*, Lord Justice-Clerk, at 178.

“universal responsibility for every engagement *bona fide* “relied on and not beyond the limits of the company’s line of “trade.”⁴ On delict, in so far as they are co-delinquents, they are liable jointly and severally, and the entire damage may be recovered from any one or more of the wrongdoers. In such cases, in any event where no moral wrong is involved, it is probable that they have a right of relief *inter se*, even although no decree of joint liability has been pronounced.⁵ Their liability, however, arises only in so far as they are joint adventurers, and it has been observed that no liability for damage arises merely *ex dominio*.⁶ Both on contract and delict actions should be brought against all the co-owners jointly. Here also, however, the rule is not invariable, and for equitable reasons will not be enforced where it would have the practical effect of defeating the action, as in the case of damage by collision where some of the co-owners are resident abroad and the vessel herself is outwith the jurisdiction, and there is therefore no means of founding jurisdiction against them all.⁷ Where co-owners are sued jointly on delict, and one or more of them are entitled to limit their liability, decree may be granted against all jointly and severally for the amount at which the liability is limited, and against those not entitled to limit their liability for the balance.⁸ On delict it is competent to express the conclusions of the summons alternatively as against all the defenders jointly and severally and against each severally. Conclusions in this form are particularly appropriate in actions for damage by collision in which material facts may only emerge on trial, and it is not clear when the summons is raised whether the damage is the result of the fault of all or of some only of the defenders, and the evidence of liability is uncertain. It is thus possible to obtain decree against one or more of the defenders if the action fails against the others.⁹ The Merchant Shipping Act expressly provides that all sums paid for or on account of any loss or damage in respect whereof the liability of owners is limited under the provisions of the Act relating to limitation of liability and all costs incurred in relation thereto “may be

⁴ Bell, Comm. ii., 649.

⁵ *Palmer v. Wick and Pulteneytown Steam Shipping Co., Ltd.*, 1894, 21 R (H.L.) 39, Lord Watson, at 44.

⁶ *M’Gee v. Anderson*, 1895, 22 R. 274.

⁷ *Gibson v. Smith*, 1849, 11 D. 1024.

⁸ *Duthie v. Caledonian Railway Co.*, 1898, 25 R. 934, Lord Moncreiff, at 944.

⁹ *Ellerman Lines, Ltd. v. Clyde Navigation Trustees*, 1909 S.C. 690, Lord President, at 692.

"brought into account among part owners of the same ship
"in the same manner as money disbursed for the use thereof."¹⁰
In an action for damage by collision, where prior to the raising of the action the underwriters had paid to the pursuers a sum in name of insurance, and assigned to them all claims which they possessed against the defenders, it has been held that the pursuers were entitled to decree for the full amount of the damage without deduction of the sum paid under the insurance.¹¹ In an action for payment against co-owners, where proof has been referred to the oath of the defenders, it has been held that reference must be made to the oath of all the co-owners individually, since the oath of one binds only himself. Reference to the oath of the ship's husband is incompetent, since he incurs no personal liability for the debt, even although it may be proved by his writ.¹² Proof by reference to oath is now seldom used.

Accounting between Co-owners.—As a joint owner of common property each co-owner has a title and interest to sue both his co-owners and third parties for his separate interest in the common property. As a joint adventurer he has a similar title and interest regarding the property as a whole within the scope of the joint adventure.¹³ The right, however, must be exercised timeously, and if he delays unduly to challenge their actions he will be held to have acquiesced in them.¹⁴ If he has acquiesced in the actings of the ship's husband, it is uncertain whether he is thereby debarred from calling his co-owners to account with reference to the same matter.¹⁵ Actions of accounting, however, against co-owners must be brought in the pursuer's proper capacity as part owner, and, if he is at the same time a necessities man and sues them in that capacity, he cannot include in the same action conclusions for payment of debts due to him as co-owner.¹⁶ It is not, however, necessary in an action of accounting that he should have the capacity of part owner at the time when the action is actually raised, and the right to sue his co-owners continues after his shares have been sold or the vessel itself

¹⁰ Sec. 505.

¹¹ *Morison & Milne v. Bartolomeo*, 1867, 5 M. 848.

¹² *Duncan v. Forbes*, 1831, 9 S. 540.

¹³ *Manners v. Raeburn & Verel*, 1884, 11 R. 899.

¹⁴ *Bennett v. MacLellan*, 1890, 17 R. 800; 1891, 18 R. 955; *Clark v. Hine*, 1912, 2 S.L.T. 290.

¹⁵ *Ferrier v. Handyside*, 1869, 6 S.L.R. 290.

¹⁶ *Mouat v. Smith*, 1881, 18 S.L.R. 687.

lost.¹⁷ The acts of a majority of co-owners bind the minority in so far as reasonable and within the scope of the adventure, and, accordingly, it has been held that a part owner is bound to contribute his share of the expenses of an action for damage to cargo which is defended by the majority, even although he has declined to concur in the defence, and that he is also bound by any reasonable compromise of their liabilities which the majority may make.¹⁸ Each voyage is not necessarily treated as a separate adventure for the purposes of accounting between co-owners, and in the absence of contrary evidence a continuing partnership is presumed and the ordinary rules of accounting apply.¹⁹ It is, however, a general practice of shipowners to keep separate accounts and strike a separate balance for each voyage in which their vessel is engaged. In England it is the practice of the Court to settle accounts between co-owners up to the date at which they have been or ought to have been rendered prior to the raising of the action.²⁰ In Scotland the common law practice is to take the date of citation as the date of accounting. In accounting, however, between co-owners this would be impracticable, and it is thought that the English practice will be followed. After the raising of the action the Court will prohibit the defenders from creating fresh charges on the vessel by mortgage or otherwise, and from dealing with the shares in any manner which might prejudice the interests of the pursuer.

The Ship's Husband: (a) Nature of Appointment.—To avoid the practical difficulties which would arise from the joint management of a vessel by a number of co-owners, the management is invariably delegated to an agent known as the ship's husband, whose employment is compulsory in law.²¹ In Scots law the ship's husband is a proper maritime officer, and actions arising from the discharge of his duties are maritime causes and subject to the Admiralty jurisdiction.²² His appointment may be either express or tacitly implied from the mere fact of his being allowed to exercise his functions.²³ The latter is frequently the case when he himself is one of the co-owners.

¹⁷ *The "Lady of the Lake,"* 1870, 3 Adm. & Ec. 529.

¹⁸ *Bennett v. MacLellan*, *supra*.

¹⁹ *The "Pongola,"* 1895, 8 Asp. M.L.C. 89.

²⁰ *The "James W. Elwell,"* 1921, P. 351, Hill J., at 368.

²¹ Merchant Shipping Act, 1894, sec. 59.

²² *M'Kinnon v. M'Leod*, 1828, 6 S. 1108.

²³ Bell, Comm. i., 503.

If the ship is laid up for any period it is uncertain if his authority as such then continues, but in any event it is limited to acts necessary for maintaining it in its existing condition.²⁴ It has been stated that he has a possessory lien "for his security" and indemnification over the documents and warrants of the "ship and over the freight recovered or which he has been "empowered to recover."²⁵ This lien, however, does not apply to the certificate of registry, which is now not "subject to detention by reason of any title, lien, "charge, or interest whatever had or claimed by any "owner, mortgagee, or other person to, on, or in the ship."²⁶ He has no maritime lien either for his disbursements or remuneration.²⁷ The duties of a ship's husband may be discharged either by an individual or by a firm, or by one of the co-owners themselves, in which case he is known as the managing owner, and has a dual capacity as both owner and agent of the owners. Regarding his position as co-owner, it has been observed that it is special in respect that he "has a duty to "perform, and is paid to render accounts which an ordinary "partner is not."²⁸ As agent, his position is the same as that of an ordinary ship's husband.² The name and address of the managing owner or ship's husband of every British ship requires to be registered,³ the purpose of this provision being to secure adequate protection for lives and property at sea by the fact of its being known who is in fact managing the vessel. If the ship goes to sea in an unseaworthy condition he may be liable to penal consequences.⁴ Owing, however, to the fact of registration, he is in the position of an agent acting for disclosed principals, and, accordingly, an obligation rests on parties dealing with him to discover whose agent he is in fact, and, if necessary, to consult the register for this purpose. There is no presumption that he is acting for himself, and he is not liable as owner of the ship unless he expressly puts himself forward as such.⁵ It has been pointed out that "the "term 'managing owner . . .' is a commercial and not "a legal expression," and that, though the managing owner is

²⁴ Abbot on Shipping, 14th edn., 135.

²⁵ Bell, Comm. i., 505.

²⁶ Merchant Shipping Act, 1894, sec. 15.

²⁷ *The "Ruby" (No. 2)*, 1898, P. 59.

¹ *The "Mount Vernon"*, 1891, 7 Asp. M.L.C. 32, Butt, J., at 32.

² *M'Lauchlan v. Hogarth & Son*, 1911 S.C. 522.

³ Merchant Shipping Act, 1894, sec. 59.

⁴ Merchant Shipping Act, 1894, sec. 457.

⁵ *Armour v. Duff & Co.*, 1912 S.C. 120.

usually appointed by and is the agent of all the co-owners, he is not necessarily so, but may in fact be appointed only by those of them who are interested in the ship's employment. The fact that he is required to be registered does not extend his authority in any way. "A managing owner registered under the Act is no more and no less than a managing owner before the Act. He binds those whose agent he is; he binds nobody besides"; and whether he has authority to bind all the co-owners "is in each case a question of fact."⁶ Although the ship's husband is the joint agent of all the co-owners who have appointed him, he is at the same time the agent of each individually, and, accordingly, at any time an individual owner may withdraw his authority to act for him.⁷ A new owner may adopt him as his agent. Thus, a mortgagee on taking possession may by implication authorise him to act for him.⁸ He is usually paid by a fixed salary or by commission. He is not allowed to retain brokerage, commissions, or discounts for obtaining charters or freights, since this is part of his duty, and he must account for them if received.⁹ A similar rule applies regarding supplies ordered by him for the ship. Following the general rule of agency, his appointment is terminable at the will of either party on reasonable notice being given. In the absence of express agreement it is terminated by the loss of the ship, the abandonment of the venture, or by his sequestration, but it may be continued in favour of his trustee. The doctrine, however, of tacit relocation, being purely customary and confined to a particular class of employment, does not apply.¹⁰

(b) Duties.—His duty is to manage the ship for the purpose of trading and earning profits. He is bound to account to the owners for freight and other moneys received on behalf of the ship, but until an accounting takes place he is entitled to treat it as his own money. "The obligation which he undertakes towards his co-owners when he receives that money is that he shall faithfully account for it in settling the accounts of the ship, and in a question with his co-owners it is for the present his own money. It just enters his account with his co-owners as an item of debit."

⁶ *Frazer v. Cuthbertson*, 1880, 6 Q.B.D. 93, Bowen, L.J., at 98.

⁷ *The "Vindobala,"* 1887, 13 P.D. 42.

⁸ *Clark v. Hine*, 1912, 2 S.L.T. 290.

⁹ *Manners v. Raeburn & Verel*, 1885, 11 R. 899; *Williamson v. Hine*, 1891, 1 Ch. 390.

¹⁰ *Hawkins v. Thomson, Dickie & Co.*, 1898, 14 Sh.Ct.Rep. 159.

Accordingly, if he is in advance with the owners for the ship's account, he may pay himself out of freight received, and may pledge it in security of advances for the ship.¹¹ He has, however, no power to receive or discharge payments in anticipation of freight.¹² Receipt of freight by his sub-agent is equivalent to receipt by him. Accordingly, the owners, in answer to a claim by him for disbursements, may plead compensation in respect of freight collected by a shipbroker employed by the ship's husband, and in such a case his trustee in bankruptcy has no higher right than the bankrupt.¹³

(c) Powers.—In the absence of express definition his powers are the following¹:—He may order necessary repairs and supplies.² In accordance with the general rule of agency he cannot delegate his authority.³ In practice, however, his duties are frequently of such variety that many of his functions are specialised and performed by ship or chartering brokers, superintendent engineers, average adjusters, and others. As ship's husband he has no authority to insure the ship,⁴ but if he is one of the co-owners he may do so in his capacity of co-owner.⁵ He may make charter parties.⁶ He may receive the freight and apply it in discharging liabilities incurred in earning it, and may recoup himself for advances made by him for that purpose on his own credit, and may recover any loss which he has incurred from the owners. For these purposes he has a right of retention or lien over the freight. The right of retention is, however, primarily against the ship, since it is dependent on freight having been earned. For this reason the opinion has been expressed that, if advances have been recovered from or retained against a purchaser of the ship, the latter has a right of relief against the seller.⁷ He cannot pledge the owners' credit for a lawsuit,⁸ but may do so to release the ship from arrestment, since this may be necessary to enable her to earn

¹¹ *Lindsay v. Adamson & Ronaldson*, 1880, 7 R. 1036, Lord President, at 1042.

¹² *Ross, Skolfeld & Co. v. State Line S.S. Co., Ltd.*, 1875, 3 R. 134.

¹³ *Macgregor's Trustee v. Cox*, 1883, 10 R. 1028.

¹ Cf. Bell, Comm. i., 503; Prin., sec. 449.

² *Hamilton & Co. v. Landale*, 1860, 22 D. 1059.

³ *Forbes v. Milne, Philip & Co.*, 1822, 2 S. 87.

⁴ *Ritchie v. Lang*, 1829, 7 S. 412.

⁵ Abbott on Shipping, 14th edn., 130.

⁶ Bell, Comm. i., 504.

⁷ *Carwell & Son v. Finlay*, 1887, 14 R. 903, Lord Shand, at 910.

⁸ *Campbell v. Stein*, 1818, 6 Dow, 116.

freight.⁹ He cannot borrow money, but may draw bills of exchange on the owners for reasonable expenditure.¹⁰ His personal liability on contract is substantially that of an agent at common law acting for a disclosed principal.¹¹ It has been held in a case where a necessities man had selected the ship's husband as his debtor that he was thereby debarred from recovering the debt from the owners. The case, however, was exceptional, in respect that he had failed to sue the owners until after the ship's husband had become insolvent, and the owners had already repaid the ship's husband for the necessities. It was observed, moreover, that the case involved no general principle.¹² He is not personally liable for the negligence of the master and crew, who are not his servants but those of the owners.¹³ Thus, he is not liable for the negligence of the crew of a vessel which is the property of the Government and registered in the name of the Shipping Controller.¹⁴

Although it has never been expressly so held, there appears to be no reason in principle why he should not on occasion exercise an agency of necessity on behalf of the cargo owners or other persons interested in the ship.¹⁵

The Master: (a) Nature of Appointment.—The master is not only the servant, but for certain purposes also the agent of the owners. His agency, however, is exercised on behalf of the owners not as owners of the vessel but as the persons who appointed him and his actual employers at the time when the liability is incurred, and, if the vessel has been demised to charterers, the original owners incur no liability for his acting, and are under no obligation to give notice of the demise.¹⁶ For similar reasons the person who is actually in control of the ship is deemed to be the master. "The appointment of master requires no written warrant of authority or peculiar solemnity. It is a contract with the owners or with the ship's husband for them, and may be entered into by verbal agreement. The mere employment of master with possession is sufficient to impose on him all

⁹ *Barker v. Highley*, 1863, 15 C.B. (N.S.) 27.

¹⁰ Bell, Comm. i., 503.

¹¹ *Craig & Co. v. Blackater*, 1923 S.C. 472.

¹² *Carsewell v. Scott*, 1839, 1 D. 1215.

¹³ *M'Lauchlan v. Hogarth & Son*, 1911 S.C. 522.

¹⁴ *Wright v. Anchor Line, Ltd.*, 1920, 1 S.L.T. 265.

¹⁵ *Prager v. Blatspiel, Stamp & Heacock*, 1924, 40 T.L.R. 287.

¹⁶ *Baumvöll Manufactur van Carl Scheibler v. Furness*, 1893 A.C. 8, Lord Watson, at 21.

"the duties, and to vest him with all the legitimate and customary powers of master."¹⁷ In practice he receives written instructions from the owner, but these are necessarily of such a general character, owing to the diversity of the situations which may arise, that the real basis of his authority is the appointment itself, by which the owners hold him out to the public as worthy of trust and confidence, and his command of the ship is presumptive evidence of his authority to order all ordinary requirements. For this reason their liability for his acts is founded not on agency proper, but on tacit agency or "holding out" within the scope of his apparent authority to which the principle of personal bar applies, and, since in this case the principal must act in good faith, relief from obligations incurred by the master within the scope of his customary authority should be sparingly conceded.¹⁸ Since his position is one of exuberant trust, he may be dismissed without cause assigned,¹⁹ unless the terms of his appointment expressly preclude it.²⁰ In certain circumstances also he may be removed from his position by the Court.²¹ In the event of the sale of the ship at sea the authority which he has received from the seller continues until he receives notice of the change of ownership, and until that date his contracts bind the purchaser as fully as if he were in fact his appointed agent.²² Where it is not reasonably possible to communicate with the owners, he may act as agent also of the cargo owners, underwriters, and of all persons interested in the ship.²³ Communication is, however, only necessary where there is reasonable ground for believing that an answer will be obtained in time to act on it.²⁴ In such circumstances his agency is one of necessity.²⁵ If the cargo owner is on the spot and declines to give instructions, the master is entitled to take such steps as are necessary for the safe carriage of the cargo, and the owners of the ship are entitled to recompense for expense thereby incurred, in so far as it is beneficial to the cargo.¹

¹⁷ Bell, Comm. i., 506.

¹⁸ *Maciver v. Boston Deep-sea Fishing and Ice Co.*, 1924 S.L.T. (Sh.Ct.) 106.

¹⁹ Bell, Comm. i., 508.

²⁰ *Green v. Wright*, 1876, 1 C.P.D. 591.

²¹ See *infra*, p. 288.

²² *Mercantile Bank v. Gladstone*, 2868 L.R., 3 Ex. 233.

²³ *Dymond v. Scott*, 1877, 5 R. 196, Lord President, at 198.

²⁴ *Australian Steam Navigation Co. v. Morse*, 1872, 4 P.C. 222; *Gemmell & Co. v. Somerville*, 1905, 12 S.L.T. 674.

²⁵ *The "Gratitude"*, 1801, 3 C. Rob. 240; *The "Hamburg"*, 1864, 2 Moo. P.C.C. 289.

¹ *Garriock v. Walker*, 1873, 1 R. 100.

(b) **Duties and Powers.**—It has been stated that by virtue of his appointment “the master has the sole direction of “the course and conduct of the ship, and all powers “which are necessary for accomplishing the voyage “in which the ship is engaged,”² and that, although in a home port his authority is superseded by that of the owners acting either directly or through the ship’s husband, in a foreign port they are very extensive.² This general statement of the law, however, now requires to be construed as subject to the limitations that the master now generally receives written instructions from the owners, that the facilities for communication with them which now exist are very extensive, and that in the majority of cases owners have now agents in the principal foreign ports. In certain directions, no doubt, owing to the complexities of modern commerce, his powers have actually been extended. His authority to bind the owners on contracts relative to the employment of the ship is somewhat wider than on those relative to necessaries. On the former, if the contract is lawful and relative to the usual employment of the ship, the owners are bound, but on the latter they are not unless the contract is entirely unavoidable.⁴ Thus, he may enter a charter party, although he has no power to vary one already made, except to the extent of altering its mode of performance in favour of the owners.⁵ If, however, he exceeds his authority, a contract is not necessarily void, since the owners may adopt it, in which case on equitable grounds they are liable on it, and the master may deduct any expenditure in which he is involved thereby from the net freight which he pays over.⁶ His power to borrow is strictly limited to the case of necessaries.⁷ Accordingly, where one person pays for the necessaries and another lends the master money to repay the advance, opinion has been reserved in the absence of proof that the loan was for the purpose of necessaries only, whether the lender has a right of action against the owners for the sum lent.⁸ He has, however, no power to draw or endorse bills of exchange for the owners in favour of their agents at a foreign port,⁹ and the opinion has been expressed

² Bell, Comm. i., 506.

⁴ Abbott on Shipping, 14th edn., 173; see *infra*, ch. viii.

⁵ Bell, Comm. i., 506; *Holman v. Peruvian Nitrate Co.*, 1878, 5 R. 657.

⁶ *Bristow v. Whitmore*, 1860, 9 H.L. 331.

⁷ Bell, Comm. i., 507.

⁸ *Drain & Co. v. Scott*, 1864, 3 M. 114.

⁹ *London Joint Stock Bank v. Stewart & Co.*, 1859, 21 D. 1327.

that the case of necessities forms no exception.¹⁰ He has no power to insure the ship.¹¹ In addition to pledging the personal credit of the owners within the scope of his authority, the master may pledge the security of the ship, freight, and cargo by instruments of bottomry and respondentia.¹² He has a right of retention of any freight which he has uplifted.¹³ By statute he has, so far as the case permits, "the same rights, "liens, and remedies for the recovery of disbursements or "liabilities properly made or incurred by him on account of "the ship" as he has for the recovery of his wages. In such cases, in any Admiralty proceeding in any Court having Admiralty jurisdiction, "if" any right of set-off or counter claim is set up, the Court may enter into and adjudicate upon "all "questions relative thereto."¹⁴

(c) **Liability of Owners for his Actings.**—It follows from the nature of his appointment that the owners are liable on contract for his actings within the scope of his real or apparent employment. Similarly they incur liability on delict for his negligence, and if he is in the position of a wrongdoer, the oath *in litem* of the pursuer, although now seldom used, is as valid against the owners of the vessel as it would be against himself.¹⁵ Certain exceptions, however, to the owners' liability on delict are recognised. Thus, they incur no liability to the crew of the vessel for the negligence of the master, since in this case the doctrine of common employment applies,¹⁶ even where the master is acting within the scope of his authority.¹⁷ Ships, however, have in law separate identities, even when they belong to the same owner. Accordingly, where loss is occasioned to the master or crew of one ship by the negligence of the master or crew of another belonging to the same owner, the doctrine of common employment does not apply, and the owners of the wrongdoing ship may then be liable to the crew of the injured vessel.¹⁸ In certain circumstances, also, he has special powers

¹⁰ *Strickland & Co. v. Neilson*, 1869, 7 M. 400, Lord Barcaple, at 406.

¹¹ *The "Serafina"*, 1863, Br. & L. 277.

¹² *Benn & Co. v. Porett*, 1868, 6 M. 577.

¹³ Bell, Comm. i., 509.

¹⁴ Merchant Shipping Act, 1894, sec. 167; see *infra*, p. 284.

¹⁵ *Gowans v. Thomson*, 1844, 6 D. 606.

¹⁶ *Leddy v. Gibson & Co.*, 1873, 11 M. 304.

¹⁷ *Downie v. Connell Bros., Ltd.*, 1910 S.C. 781; *Hedley v. Pinkney Shipping Co., Ltd.*, 1894 A.C. 222.

¹⁸ *Grangemouth and Forth Towing Co., Ltd. v. s.s. "River Clyde" Co., Ltd.*, 1908, 16 S.L.T. 638.

conferred on him as an individual, the misuse of which involves a penalty.¹⁹ In such cases no liability is incurred by the owner.²⁰

(d) Personal Liability.—The master may also incur personal liability as an individual. Formerly he was himself almost invariably a part owner and liable as such, but this is now rarely the case. In respect of his personal liability, his position differs materially from that of other agents, since the personal liability may arise even when he is acting for known and registered principals. Moreover, he is not entitled to limit his liability for delict on the ground of absence of fault or privity in circumstances in which the owners are entitled to do so, since the statutory provisions for limitation of liability do not apply to him. Since, however, he is usually a person of small means, a substantial remedy can rarely be obtained from him. No action lies against him on contracts made or liabilities incurred by the owners alone, or in circumstances which show that credit was given to the owners alone. He is not liable for the wrongful acts of the crew.

(e) Election as Between Owner and Master.—The extent to which the principle of election applies as between master and owner is uncertain. In delict it, of course, does not apply. On contract in England it has been held that, where either the master or the owner has been “sued to judgment,” the creditor cannot then take further proceedings against the other.²¹ Until this decision the opinion was held in Scotland that the liability of the master and owner on contract was joint and several, and doubts have been expressed whether the decision should be followed in Scotland. The principle as it now stands in Scotland has been thus stated—“Election is no doubt recognised in our law in the case of a shipmaster and a shipowner where the master is sued on his own obligation and decree is given against him, he having relief against the owner. There is no doubt that the owner cannot be sued for the same debt—that is common sense—but where the master has not been sued to judgment or the action fails from some technical reason or another the case is different. The fact of the pursuer having sued the wrong

¹⁹ Merchant Shipping Act, 1894, secs. 128 (1), 223.

²⁰ *O'Neil v. Rankine & Co.*, 1873, 11 M. 538; *Downie v. Connell Bros., Ltd.*, *supra*.

²¹ *Priestley v. Fernie*, 1865, 34 L.J. Ex. 172; approved in *Kendall v. Hamilton*, 1879, 4 App.Cas. 504, Lord Cairns, L.C., at 514.

“ man will not bar him from suing the right one, and the same rule must apply if he has failed to recover.”²² It has been pointed out, however, that in all cases where the master and owner have been held jointly and severally liable in Scotland, the master had assumed full personal liability by signing a bill or other personal obligation on which the action was brought.²³ The authority of the master of a foreign ship is determined by the law of the flag.²⁴

²² *Meier & Co. v. Kuchenmeister*, 1881, 8 R. 642, Lord Justice-Clerk, at 644.

²³ Bell, Prin., sec. 450, note (v).

²⁴ *The “Gaetano and Maria,”* 1882, 7 P.D. (C.A.) 137.

CHAPTER II.

MORTGAGE.

Nature of the Security.—By the Merchant Shipping Act, 1894, “a registered ship or a share therein may be made a “security for a loan or other valuable consideration” by means of an instrument in statutory form which may be registered and is known as a mortgage.¹ Such an instrument is contrary to the general rule of law that a security over moveables can only be created by the delivery, actual or constructive, of its subject, but, since ships are constantly employed at sea and carry their documents of title with them, it was found that the owners were rarely in a position to offer delivery, either actual or constructive, and, accordingly, a form of civil delivery by entry in a register was introduced under the Merchant Shipping Acts. The mortgage confers a personal right on the mortgagee as against the owner of the ship or share, which in certain events may be enforced by proceedings *in rem* against the ship. By it the mortgagee acquires a right of property in the ship in default of payment of the debt to the extent necessary to enforce his security, which carries with it the right of sale *ex proprio motu*, and in certain events the right of taking possession of the vessel or of bringing it to judicial sale. The statutory form prescribed by the Act includes “the ship . . . her boats, guns, ammunition, small “arms, and appurtenances.”² It has been held that it thus includes all articles necessary to her navigation or to the prosecution of her adventure which were on board at the date of the mortgage, as well as articles brought on board in substitution for them subsequently to the mortgage.³

Rights and Obligations of Mortgagor.—So long as he does not imperil the security, the mortgagor is entitled to retain possession of the ship and to exercise all the rights of ownership, so far as these are not inconsistent with the mortgagee's

¹ 57 & 58 Vict. c. 60, sec. 31.

² Merchant Shipping Act, 1894, First Schedule, Part I., Form B.

³ *Coltman v. Chamberlain*, 1890, 25 Q.B.D. 328.

security.⁴ Thus, he may enter contracts of affreightment,⁵ and incur obligations for necessities,⁶ and, if advantageous for her employment, may remove the vessel from the jurisdiction and expose her to all the perils of the sea.⁷ In the course of her employment it is possible that certain real liabilities, such as those arising from maritime liens, may attach to the vessel, and may rank in priority to claims under the mortgage.⁸ The obligation, however, not to imperil the security in any manner unnecessary for the legitimate employment of the ship is fundamental. Thus, the mortgagor may not send her to sea uninsured, and if he intends to do so the mortgagee may intervene by interdict, and will incur no liability thereby to a charterer who has suffered loss by reason of the interdict.⁹

Rights and Obligations of Mortgagee.—As soon as his security for the debt is in any way imperilled, the mortgagee is entitled to take possession, and thereupon acquires the position of owner, and is entitled to deal with the ship as owner in possession.¹⁰ Thus, he may draw any freight which falls due during his possession, and in order to secure it may exercise an owner's lien over the cargo.¹¹ Since freight is generally only earned on the termination of a voyage, he may by this means acquire right to the entire freight of a voyage which terminates during his possession, even although he was not in possession at its commencement.¹² His right to freight, however, arises merely in virtue of his possession, and not in consequence of any implied contractual obligation or assignation on the part of the owner, who cannot assign any higher right than he himself possesses.¹³ His interest is such that he may petition for recall of an arrestment of the ship for a debt of the owner.¹⁴ His liabilities are those of an exercitor of the ship. Thus, he is liable for the price of necessities supplied to her by his authority during his possession.¹⁵ The master

⁴ *Collins v. Lamport*, 1864, 34 L.J. Ch. 196; *Keith v. Burrows*, 1876, 1 C.P.D. 722; 2 A.C. 636.

⁵ *Laming & Co. v. Seater*, 1889, 16 R. 838.

⁶ *Elias v. Black*, 1856, 18 D. 1225.

⁷ *The "Fanchon"*, 1880, 5 P.D. 173.

⁸ *The "Manor"*, 1907, P. (C.A.) 339, Fletcher Moulton, L.J., at 361.

⁹ *Laming & Co. v. Seater*, *supra*.

¹⁰ *Keith v. Burrows*, *supra*.

¹¹ Bell, Comm. i., 521.

¹² *Stewart v. Greenock Marine Insurance Co.*, 1847, 1 Macq. 328.

¹³ *Keith v. Burrows*, 1876, 1 C.P.D. 722; 2 A.C. 636.

¹⁴ *Stewart v. Macbeth & Gray*, 1882, 10 R. 382.

¹⁵ *Havilland, Routh & Co. v. Thomson*, 1864, 3 M. 313.

has, however, no implied authority to act for him, and his mandate to do so requires to be expressed.¹⁶ Similarly, he is liable for insurance effected in his name and by his authority, but not for insurance effected in the name of the owner either in the customary manner or by entry of the ship in the books of a mutual insurance company, since this practice is not properly insurance at all, but merely an expedient for avoiding its expense.¹⁷

Limitations on Ownership of Mortgagee in Possession.—His ownership is, however, subject to certain limitations. The Act provides that, “except so far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof.”¹⁸ It has been pointed out that the intention of this provision is “to protect a mortgagee taking possession of a mortgaged ship in order to make it available as a security from certain liabilities which frequently attach upon an owner of a ship in possession.” Accordingly, a creditor of the mortgagor is not entitled to defeat the mortgage by using diligence against the ship for the mortgagor’s debt, even although the instrument of mortgage postpones the mortgagee’s power of sale to a date subsequent to that of the diligence.¹⁹ This decision has been approved in Scotland.²⁰ Since his ownership is only for the purpose of securing the debt, he is only entitled to take possession for the limited purpose of realising the property. He is, however, entitled to await a favourable opportunity of doing so, and in the interval may employ the vessel in a reasonable and prudent manner.²¹ His right of ownership is further qualified by the fact that his control of the ship may be limited by contracts already made by the mortgagor while still in possession, and by the fact that as soon as the debt in security is extinguished he is bound to account to the mortgagor for any reversion which there may be.²² He may, however, pay off a prior claim against the owner in order to release the ship from arrestment, and so to enable himself to

¹⁶ *The “Troubadour,”* 1866, 1 Adm. & Ec. 302.

¹⁷ *Maclaren v. Buik*, 1829, 7 S. 483.

¹⁸ Sec. 34.

¹⁹ *Dickenson v. Kitchen*, 1858, 8 El. & Bl. 789, Crompton, J., at 800.

²⁰ *Clydesdale Bank, Ltd. v. Walker & Bain*, 1925 S.L.T. 676.

²¹ *De Mattos v. Gibson*, 1859, 28 L.J. Ch. 165.

²² *Keith v. Burrows*, 1876, 1 C.P.D. 722; 2 A.C. 636.

take possession, and may recover the amount so paid from the owner,²³ but he has no title to challenge an arrestment of the ship for a debt of the owner if he has incurred no loss thereby.²⁴ It has been held that his ownership is not such that arrestment of the ship *ad fundandam jurisdictionem* founds jurisdiction against him, in any event in an action which proceeds on the ground that he has no right of property under the mortgage.²⁵

Bankruptcy of Mortgagor.—In the event of the bankruptcy of the owner of the ship a mortgagee in Scotland appears to be in a less favourable position than in England. The Act provides that “a registered mortgagee of a ship or share shall not “be affected by any act of bankruptcy committed by the mort- “gagor after the date of the recording of the mortgage, not- “withstanding that the mortgagor at the commencement of “his bankruptcy had the share or shares in his possession order “or disposition, or was reputed owner thereof, and the mort- “gage shall be preferred to any right, claim, or interest “therein of the other creditors of the bankrupt or any trustee “or assignee on their behalf.”¹ It has been observed that “it is not easy to adapt this enactment to the rules of Scots “law, as the words used seem almost entirely borrowed from “the law of England.”² It has, however, been held regarding the corresponding provision in the Registry Act of 1845³ that it does not supersede the Act 1696, c. 5, against alienations of a bankrupt’s property within sixty days of bankruptcy, irrespectively of whether the mortgagee has taken possession or not,⁴ and the same result appears to follow from the terms of the Merchant Shipping Act now in force. In England there is, of course, no enactment corresponding to the Act of 1696, and in England the mortgagee has the additional privilege that, where a mortgage has been granted without notice by a person who is already bankrupt, he is protected by the Bankruptcy Act, 1914.⁵ The Merchant Shipping Act further provides that where a certificate of mortgage “contains a specifica- “tion of the place at which and a limit of time, not exceeding “twelve months, within which the power is to be exercised,

²³ *The “Orchis,”* 1890, 15 P.D. (C.A.) 38.

²⁴ *Elias v. Black*, 1856, 18 D. 1225.

²⁵ *Jones v. Samuel*, 1862, 24 D. 319.

¹ Sec. 36.

² *Anderson v. Western Bank*, 1859, 21 D. 230, Lord Ordinary, at 232.

³ 8 & 9 Vict. c. 89, sec. 46.

⁴ *Anderson v. Western Bank*, *supra*.

⁵ 4 & 5 Geo. V. c. 59, sec. 45; *The “Ruby,”* 1900, 9 Asp. M.L.C. 146.

“a mortgage made in good faith to a mortgagee without notice shall not be impeached by reason of the bankruptcy of the person by whom the power was given.”⁶ On the principle of the decision above quoted, it appears that this provision also requires to be read subject to the provisions of the Act of 1696, c. 5.

Transfer.—A registered mortgagee may transfer his mortgage to any person by a transfer in specified form, which requires to be registered.⁷

Transmission.—The transmission of the interest of a mortgagee in a ship or share on marriage, death, or bankruptcy, “or by any lawful means other than by a transfer under this Act,” requires to be authenticated; to be accompanied by like evidence as is required in the case of transmission of ownership; and to be registered.⁸

Discharge.—The discharge of a registered mortgage may be entered in the register book, whereupon “the estate (if any) which passed to the mortgagee shall vest in the person in whom (having regard to intervening acts and circumstances if any) it would have vested if the mortgage had not been made.”⁹ Where a mortgagee had drawn a bill of sale of a mortgage which was invalidly executed, and at the same time had discharged the mortgage, it has been held that even if the formal title reverted to the mortgagor the beneficial interest had vested in the purchaser, and, accordingly, that in order to cure the defect in his formal title he was entitled to a decree ordaining the registrar to register a second bill of sale.¹⁰ In similar circumstances in England it has been held that the purchaser was entitled to a decree declaring that he was entitled to possession of the ship, and that all things might be done necessary to complete his title thereto.¹¹ In a question of priorities, however, it has been held that the entry of a discharge in the register discharges the mortgage, and that it cannot be revived by memorandum inserted in the register that the discharge was made by mistake.¹²

⁶ Sec. 43 (4).

⁷ Sec. 37.

⁸ Sec. 38.

⁹ Sec. 32.

¹⁰ *Duthie v. Aiken*, 1892, 20 R. 241.

¹¹ *The “Rose,”* 1873, 4 Adm. & Ec. 6.

¹² *Bell v. Blyth*, 1868, 4 Ch. 136.

Certificates of Mortgage.—The registered owner of a ship or share who desires to mortgage his property “at any place “out of the country in which the port of registry of the ship “is situate” may do so by obtaining a certificate of mortgage in prescribed form from the registrar.¹³ Such certificates, however, cannot be granted so as to authorise a mortgage in that portion of the British Dominions in which the ship is registered.¹⁴ The mortgage is registered by the endorsement of the certificate by a registrar or British Consular officer, and the mortgagee thereby acquires substantially the same rights and powers and incurs substantially the same obligations as if the mortgage had been registered in the register book.¹⁵ Such certificates are intended to facilitate mortgages in favour of persons who are resident in a different part of the British Dominions from that of the ship’s port of registry, and who for that reason have not ready access to the register book. The certificate has the effect of placing before the intending mortgagee all the information regarding the ship which is contained in the register book.

Sale by Mortgage.—Every registered mortgagee has an absolute power of sale of the ship or share in respect of which he is registered, whether authority to do so is contained in the mortgage deed or not, and of giving effectual receipts for the purchase money. A subsequent mortgagee, however, cannot sell without the concurrence of every prior mortgagee, except under the order of a Court of competent jurisdiction.¹⁶ The sale requires to be by bill of sale in prescribed form,¹⁷ and the bill of sale followed by possession effectually vests the property in the purchaser even without registration. Accordingly, his right is not affected by the subsequent sequestration of a seller whose name still remains on the register.¹⁸ The only ground on which the mortgagor may challenge the sale is fraud for the purpose of defeating his own reversion.¹⁹ If any surplus results from the sale after discharge of the mortgage debt, the mortgagee is in the position of a constructive trustee for its amount.²⁰ He must render an account of his intromissions to

¹³ Secs. 39-46.

¹⁴ Sec. 41.

¹⁵ Sec. 43.

¹⁶ Sec. 35.

¹⁷ Secs. 24-26.

¹⁸ *Watson v. Duncan*, 1879, 6 R. 1247.

¹⁹ *Dickenson v. Kitchen*, 1858, 8 E. & B. 789.

²⁰ *Banner v. Berridge*, 1881, 18 Ch.D. 254.

the owner, against whom he may charge the expenses of the sale, but he is not entitled to a commission for executing it.²¹

Method of Enforcing the Security: (a) By Entering Possession.—If the security is in any way imperilled, the mortgagee may take possession of the property, even although there has been no default in payment of the debt and he has taken no judicial proceedings to enforce it, and he may apply the earnings of the ship in reduction or extinction of the debt in a similar manner.²² Evidence of possession is a question of fact. Possession either of the entire ship or of a majority of the shares may be taken by any overt act, as “by an agent “for or a servant of the mortgagee acting independently of and “in some respects in opposition to the master of the vessel who “holds the same under the orders and for behoof of the owner “or owners.”²³ Thus, uplifting the fares of a passenger vessel, paying her accounts and directing her employment, is sufficient evidence of possession.²⁴ The act of placing a representative on board and intimating the fact to the master is sufficient,²⁵ as is also intimation by the owner of the ship to the master, but intimation to the master by the mortgagee alone is not.²⁶

Where the mortgagee possesses only a minority of the shares, physical possession of the ship itself is, of course, excluded, and the mortgagee can then only intervene actively in exceptional circumstances. Constructive possession of a share, however, may be taken by giving notice of intention to take possession to the owner of the share.¹ In a case where the mortgagor of a share was also the ship's husband, it has been held that the mortgagee by concurring with the owners of the other shares in removing him had taken possession to the effect of defeating the right of the mortgagor to the portion of freight effeiring to his share, and, accordingly, that the mortgagee was preferable to an assignee claiming an assignation of the freight by the mortgagor.²

²¹ *Robertson-Durham v. Constant*, 1907, 15 S.L.T. 131.

²² *The “Manor,”* 1907, P. (C.A.) 339; cf. *Laming & Co. v. Seater*, 1889, 16 R. 838; *Cargill v. Garscadden*, 1911, 27 Sh.Ct.Rep. 244.

²³ *Duncan v. Don*, 1861, 23 D. 544, Lord Ordinary, at 549.

²⁴ *Russell v. Baird*, 1839, 1 D. 931.

²⁵ *The “Fairport,”* 1884, 10 P.D. 13.

²⁶ *Duncan v. Don*, *supra*, Lord Ordinary, at 549.

¹ *Duncan v. Don*, *supra*.

² *Beynon v. Godden*, 1878, L.R. 3 Ex.D. 263.

(b) **By Decree of Court.**—Where the existence of the mortgage or the right of the mortgagee to take possession is contested, it will be necessary to invoke the jurisdiction of the Court. Procedure in such circumstances may be by an action with petitory conclusions for payment of the debt and with declaratory conclusions, in the event of non-payment, of the existence of the mortgage, and of the right to take possession or to bring the vessel to a judicial sale.³

Remedies of Mortgagor.—If a sale of the mortgage is fraudulent for the purpose of defeating the reversion of the mortgagor, it may be reduced by him. It has been held that this is the only ground on which the sale of a mortgage can be challenged by the mortgagor.⁴ If the mortgagor has been wrongfully dispossessed, he may take proceedings *in rem* to recover the vessel. Procedure may be by an action of declarator of ownership with conclusions for delivery, and, if the mortgagee is about to remove the vessel from the jurisdiction, he may be interdicted from doing so. In such a case arrestment of the vessel *ad fundandam jurisdictionem* against the mortgagee is incompetent, since the action is necessarily laid on the ground that he has no right of property in her.⁵

Ranking of Mortgages.—Mortgages are recorded in the order of time in which they are produced to the registrar.⁶ *Inter se* they rank not according to their own date, but according to their date of registration.⁷ In a question of ranking it has been held in England that an entry of discharge in the register discharges the mortgage, and that it cannot be revived by a memorandum on the register that the discharge was made by mistake.⁸ In competition with other claims mortgages rank after possessory and maritime liens and before personal claims.⁹

Second Mortgages.—A second mortgagee appears to have no right to take possession, since he might thereby imperil the security of the first mortgagee. In Scotland, subject to the above limitation, he appears to be in the same position as the first mortgagee. In England, however, his interest is merely

³ *Laming & Co. v. Seater*, 1889, 16 R. 838; *Constant v. Christiensen*, 1912 S.C. 1371.

⁴ *Dickenson v. Kitchen*, 1858, 8 E. & B. 789.

⁵ *Jones v. Samuel*, 1862, 24 D. 319.

⁶ Sec. 31 (2).

⁷ Sec. 33.

⁸ *Bell v. Blyth*, 1868, 4 Ch. 136.

⁹ *Bell*, Comm. ii., 513; see *supra*, p. 29.

an equitable one. His rights, therefore, may be postponed to any prior equities which exist, such as the claim of an assignee to freight.¹⁰

Unregistered Mortgages and Equitable Rights in Security.—A British ship can only be mortgaged in the form prescribed by the Merchant Shipping Act. The Act, however, provides that, subject to its provisions relating to the exclusion of unqualified persons from the ownership of British ships, interests arising under contract or other equitable interests may be enforced by or against mortgagees of ships in respect of their interest therein in the same manner as in respect of any other personal property.¹¹ An unregistered mortgage is not, therefore, necessarily entirely void, but forms an equitable charge upon the ship, and may be effectual not only as between the parties to it, but also as against other unregistered mortgages.¹² For similar reasons the execution of instruments of security in the common law form is still competent, such as an *ex facie* absolute transfer or a bill of sale with a back letter, but, as these imply all the liabilities of ownership without its full title, they are now seldom used. Moreover, since the bill of sale of a British ship requires to be in the form prescribed by the Act, it cannot be executed in favour of a person unqualified to own such a vessel.¹³ On equitable grounds it has been held in England that an *ex facie* absolute transfer may be treated as a transfer in security, if such is the intention of the parties,¹⁴ and in general the Court will enforce equitable agreements, either express or implied, as between owners and mortgagees.¹⁵ Similarly, where the registered mortgagee truly holds for some other person, the latter is entitled to enforce his interest by obtaining registration. Procedure may be by action of declarator of title to be registered, and to have the registrar of shipping at the port of registry of the ship ordained to register the title. In such a case the Lord Advocate should also be called as representing the Commissioners of His Majesty's Customs for their interest, who are charged under sec. 65 of the Merchant Shipping Act, 1894, with a general supervision of the formalities of registration. The opinion has been expressed

¹⁰ *Keith v. Burrows*, 1876, 1 C.P.D. 722; 2 A.C. 636.

¹¹ Sec. 57.

¹² *Liverpool Marine Credit Co. v. Wilson*, 1872, 7 Ch.Ap. 507.

¹³ Secs. 24-30.

¹⁴ *The "Innisfallen,"* 1866, 1 Adm. & Ec. 72.

¹⁵ *The "Cathcart,"* 1867, 1 Adm. & Ec. 314.

that the Court has jurisdiction to order that its decree shall also be registered.¹⁶ A registered mortgage is not invalidated by reason of the detailed stipulations regarding it being contained in a collateral agreement and not appearing in the mortgage itself.¹⁷ By such collateral deeds, therefore, it is possible for the rights of the mortgagee to be extended and enlarged. An equitable charge may be created over an uncompleted ship, whether or not it has yet assumed the identity of a ship, by deposit of the builder's certificate,¹⁸ and an equitable charge may be created merely by deposit of a registered mortgage deed, since any transfer of the mortgage, which can only be effected by memorandum inscribed by the registrar on the instrument of transfer,¹⁹ is thus precluded.²⁰

¹⁶ *Duthie v. Aiken*, 1892, 20 R. 241, Lord MacLaren, at 247.

¹⁷ *The "Benwell Tower"*, 1895, 8 Asp. M.L.C. 13.

¹⁸ *Ex parte Hodgkin*; *In re Sofley*, 1875, 20 Eq. 746.

¹⁹ Sec. 37.

²⁰ *Lacon v. Liften*, 1862, 4 Giff. 75.

CHAPTER III.

BOTTOMRY AND RESPONDENTIA.

Nature of the Contract.—Bottomry or respondentia is a contract in the nature of mortgage by which a ship and its freight or its cargo is pledged in security of advances made to enable it to prosecute a particular voyage, but differs from mortgage in respect that no property passes in the subject and from pledge in respect that no possession is given. It has been defined as a contract by which “money is in contemplation of a particular voyage lent to the master of a ship in a foreign country, or to the owner of the ship or cargo in a home port; on this condition, that if the subject on which the money is taken be lost by sea risk or superior force of the enemy, the lender shall lose his money; and that, if the voyage should be successful, the same shall be repaid with a certain profit or consideration for interest and risk as agreed upon, and for the payment both the person of the borrower is bound and the ship in bottomry or goods in respondentia are in certain cases hypothecated to the lender.”¹ The obligation thus constituted remains good against a subsequent purchaser in the course of the voyage, and may be enforced against a previous mortgagee or lender on vendition in security.²

Circumstances in which the Contract is Appropriate.—In the case of British ships the contract of bottomry or respondentia is now uncommon. At the home port the personal credit of the owners is generally sufficient to secure any advance which may be necessary. At out ports British shipowners have generally accredited agents, whose duty it is to make advances for the ship, and it has been pointed out that “in recent times . . . the most usual way for necessities to be supplied to a ship elsewhere than in the home port is upon the credit of the ship’s agent, acting either upon general instructions or upon specific authority of the owner. Such method of supply has taken the place of bottomry greatly to the advance

¹ Bell, Comm. i., 531.

² Bell, Comm. i., 535.

“of shipowners.”³ Where ship’s agents are absent, the master has generally ample means of communicating with the owners and of obtaining their personal credit. Where for any reason the security of the ship herself is desired, a statutory mortgage in the form provided by the Merchant Shipping Act now affords greater security, and consequently demands a lower rate of interest, and for this reason is generally preferred. In certain cases, however, as where a vessel has been driven by stress of weather into a remote port of call where the owner is unknown and no ship’s agent has been appointed, the contract may still require to be entered. In the case of foreign ships, to which the privileges of the British statutory mortgage do not extend and the personal credit of whose owners is frequently limited, it is still fairly common.

Essentials of the Contract: (a) Necessity.—The essentials of the contract are—(a) An unqualified necessity for the advance to enable the voyage to proceed; (b) a definite date on which it is repayable; and (c) the existence of a maritime risk, *i.e.*, the dependence of the right of repayment on the safe arrival of the vessel at its port of destination. Necessity does not arise if it is by any means possible to obtain the advance in another less onerous manner, but only in respect of “any combination of events which would prevent the completion of the voyage with profit unless money should be raised by bottomry.”⁴ Necessity is therefore in each case a question of fact, which is independent of the question whether the advance is actually required for “necessaries” in the legal sense of the term or not. Thus, necessity for an advance may arise in order to secure the release of an arrested ship.⁵ It has been held that it does not arise for the purpose of discharging a personal debt of the owner, or of paying for supplies which have already been furnished.⁶

(b) A Definite Date of Repayment.—A definite date, usually the termination of the voyage, requires to be named in the instrument at which the advance is repayable. In England it has been held that it may be made repayable on the arrival of the vessel at an intermediate port of call.⁷ In Scotland there

³ *The “Moglieff,”* 1921, P. 236, Hill, J., at 244.

⁴ *The “Karnak,”* 1869, 2 P.C. 505, at 512.

⁵ *Smith v. Gould*, 1842, 4 Moo. P.C.C. 21, at 25.

⁶ *Miller & Co. v. Potter, Wilson & Co.*, 1875, 3 R. 105.

⁷ *The “Haabet,”* 1899, P. 295.

is no express decision to this effect, but it has been observed that there is no reason in principle why the advance should not be made repayable at an intermediate port, more especially since the instrument might then be renewed for the remainder of the voyage on more favourable terms.⁸ In England it has been held that the ship may be arrested in security of the advance before the date of repayment arrives, provided that there is any reasonable risk of the security being lost or diminished, but that it may be released without bail on payment into Court of the amount of the advance with interest.⁹

(c) **A Maritime Risk.**—The existence of a maritime risk is essential. In such contracts the maritime risks are generally considerable. In addition to that of the ship being lost on the voyage or of its arrival in a valueless condition, there is the possibility that a second contract of bottomry may be made at an intermediate port, or that a maritime lien *ex contractu* may subsequently attach and so rank in priority. Moreover, since the contract is governed by the law of the ship's flag, the lender may be involved in obligations of whose existence he is ignorant.

Maritime Interest.—The existence of a maritime risk necessarily implies a high rate of interest, known as the premium or maritime interest. There is a conflict of decision as to whether the existence of maritime interest is an essential of the contract. In England it has been held that it is not.¹⁰ In Scotland the opinion has been expressed that the absence of a stipulation for maritime interest is conclusive evidence that the contract is not a valid one of bottomry.¹¹ In another case, where a bill of exchange had been drawn for repairs and a bottomry bond granted in further security, it was held that no maritime risk existed, and, consequently, no maritime interest being possible, that the bond was invalid.¹² In England in similar circumstances the bond is not invalid, but only comes into force when the grantor has failed or appears likely to fail to meet his personal obligation.¹³ Maritime interest does not run from day to day, but runs concurrently with the maritime risk and terminates with it.¹⁴ It is not subject to the laws

⁸ *Anderston Foundry Co. v. Law*, 1869, 7 M. 836, Lord Kinloch, at 845.

⁹ *The "Endora,"* 1879, 4 P.D. 208.

¹⁰ *The "Haabet,"* 1899, P. 295.

¹¹ *Miller & Co. v. Potter, Wilson & Co.*, 1875, 3 R. 105, Lord Gifford, at 114.

¹² *Sword v. Howden*, 1826, 4 S. 765.

¹³ *The "Staffordshire,"* 1872, 4 P.C. 194.

¹⁴ Bell, Comm. i., 532.

against usury, but the Court will exercise an equitable jurisdiction in reducing it where excessive,¹⁵ although owing to the magnitude of the maritime risk the power of reduction is exercised with caution. Ordinary interest runs both on the principal sum and on the premium from the date when the principal sum becomes repayable and the maritime risk ceases.¹⁶ The advance need not necessarily be in the form of money, and the ship may competently be hypothecated to a shipwright for repairs or to a ship chandler for supplies.¹⁷ The instrument hypothecates the ship until it is completely destroyed, and the doctrine of constructive total loss does not apply.¹⁸ The nature of the contract is such that the owners have the option of either repaying the advance or of abandoning the ship to the lender, and, if the doctrine of constructive total loss were recognised, the result might, in cases where the value of the ship exceeded the amount of the advance, be that the property of the owners was virtually confiscated.¹⁹ The contract covers only such freight as is earned before repayment of the advance becomes due, since subsequent freight is not at risk.²⁰ Hypothecation of the freight apart from the ship is incompetent.

Form of the Contract.—Contracts of bottomry and respondentia require to be in writing, and generally take the form of a bond, but any form is competent provided that the essentials of the contract are present.²¹ The inclusion of invalid conditions does not necessarily vitiate the remainder of the contract. Thus, a bond may be valid as regards the ship and freight and invalid as regards the cargo.²² The bond does not cover the insurance of the sum advanced.²³ The onus of proving the validity of the contract rests upon the lender.²⁴ Where separate actions are raised on contracts expressed in similar terms they may be conjoined.²⁵

¹⁵ *The "Huntley,"* 1860, Lush. 24.

¹⁶ *The "Cecilie,"* 1879, 4 P.D. 210.

¹⁷ Bell, Comm. i., 531.

¹⁸ *The "Great Pacific,"* 1869, 2 P.C. 516; *Broomfield v. Southern Insurance Co.*, 1870, 5 Ex. 192.

¹⁹ *Cochrane v. Gilkison*, 1857, 20 D. 213.

²⁰ *The "Staffordshire,"* 1872, 4 P.C. 194.

²¹ *The "Mary Ann,"* 1865, 1 Adm. & Ec. 13.

²² *Miller & Co. v. Potter, Wilson & Co.*, 1875, 3 R. 105.

²³ *The "Beddingtons,"* 1832, 2 Hagg. Adm. 422.

²⁴ *Jacobsen v. Hansen*, 1850, 12 D. 762, Lord Justice-Clerk, at 771.

²⁵ *The "Albion,"* 1825, 1 Hagg. Adm. 333.

The Borrower.—Any person with a vested assignable interest in the ship, such as the owner, the master, or a mortgagee, may borrow on bottomry or respondentia.²⁶ The owner may do so where both he and the ship are at a foreign port,¹ but not where both are at a home port.² A part owner may do so to the extent of his own share only.³ In the majority of cases the contract is made by the master at a foreign port. His primary duty, however, is to obtain the necessary advance on the credit of the owners or in some other less onerous manner, and before borrowing he should use every available means of communicating with the owners and obtaining their consent, provided that an answer is possible within a reasonable period looking to the circumstances of the case.⁴ The communication should expressly declare the necessity not only for an advance, but also for the hypothecation of the vessel. Failure to communicate is not excused by the insolvency of the owner unless his insolvency has been judicially declared, in which case the duty remains on the master of communicating with the trustee in bankruptcy.⁵ Where the contract is made by the master, the authorities are in conflict as to whether the owner also incurs a personal liability. Erskine states that no obligation is incurred by the borrower, but only by the ship and freight,⁶ while Bell states that both ship and owner are bound.⁷ A third view is that the master and ship are bound, but not the owner, irrespectively of whether the contract professes to bind the owner or not.⁸ This last view has been affirmed both in Scotland and England, in any event in cases where it has been found impossible to communicate with the owner. Thus, where the master had granted a bottomry bond, and at the same time drawn a bill on the owner for the amount, it was held that the owner had incurred no liability under the bond.⁹ Similarly, where an action had been raised against the master on a bottomry bond granted in ordinary form, it was held that the ship could not be arrested on the dependence of

²⁶ Bell, Comm. i., 531.

¹ *The "Duke of Bedford,"* 1829, 2 Hagg. Adm. 294.

² *The "Helgoland,"* 1859, Swa. 491.

³ Bell, Comm. i., 531.

⁴ *Jacobsen v. Hansen, supra*; *Kleinwort, Cohen & Co. v. Cassa Maritima of Genoa*, 1877, 2 App.Cas. 156.

⁵ *The "Panama,"* 1870, 3 P.C. 199.

⁶ Inst., 3, 3, 17.

⁷ Comm. i., 532.

⁸ Abbott on Shipping, 14th edn., 209.

⁹ *Cochrane v. Gilkison*, 1854, 16 D. 548.

the action, since it was not the property of the master, and that the owner was not the proper defender in an action on a bottomry bond, and, accordingly, that a special warrant of arrestment was necessary to detain it.¹⁰ The opinion has been expressed that a bottomry loan is made essentially on the security of the property, and not on the credit of the owner.¹¹ It is thought that the owner will be held to incur no personal obligation unless it has been possible to communicate with him and his credit has been expressly pledged in the instrument. The rule that the master may be personally liable on an instrument from which he derives no personal benefit appears to be intended as an incentive to him to use the utmost diligence in preserving the property.

The Lender.—Any person may make an advance on bottomry or respondentia, and the advance need not take the form of money. Thus, it may be in the form of repairs executed by a shipwright or supplies furnished by a ship chandler.¹² It was formerly a common practice for the advance to be made by the consignees of the cargo, and this is not incompetent even in cases where the consignees have themselves appointed the master who obtains it.¹³ The advance may be made by the ship's agent himself, but he is in a somewhat special position, since it is his ordinary duty to make advances on his own credit. Accordingly, before making an advance he should inform the master that he is unable to give the owner personal credit beyond a certain amount.¹⁴ It is the duty of the lender to assure himself of the necessity of the contract, and the onus of proving its validity rests upon him.¹⁵ It is not, however, necessary to take into account private transactions taking place between the owner and a mortgagee which might possibly render the voyage illegal.¹⁶ In a competition lenders are preferred in inverse order to the date of their contract, since without the latest loan the voyage could not have been completed.¹⁷

Maritime Lien.—The lender on bottomry or respondentia acquires a maritime lien for his advance, which extends not

¹⁰ *Lucovich, Petr.*, 1885, 12 R. 1090.

¹¹ *The "Ripon City"*, 1897, P. 226, Gorell Barnes, J., at 245.

¹² Bell, Comm. i., 531.

¹³ *The "Alexander"*, 1811, 1 Dods, 278.

¹⁴ *The "Staffordshire"*, 1872, 4 P.C. 194.

¹⁵ *Jacobsen v. Hansen*, 1850, 12 D. 762.

¹⁶ *The "Mary Ann"*, 1865, 1 Adm. & Ec. 13.

¹⁷ Bell, Comm. i., 535.

only to the ship and the freight of the voyage in respect of which the advance is made, but also in the case of respondentia to the cargo.¹⁸ It is necessary, however, that the proceeds of the ship and freight should first be exhausted before recourse is had to the cargo.¹⁹ The lien covers also the maritime interest.²⁰ Since the advance is made on the security of the property primarily, the opinion has been expressed that the lien may be enforced independently of any personal liability of the owner.²¹ It becomes effective as soon as the date of repayment of the loan arrives or the vessel is abandoned by the owner.

Respondentia.—The contract of respondentia is substantially similar in nature to that of bottomry, but from the nature of the case certain specialities arise. Thus, the agency of the master for the cargo is entirely one of necessity, since he is primarily the servant and agent of the shipowner.²² Moreover, he only acquires control of goods actually placed on board his vessel, and accordingly cannot hypothecate the cargo before it has been shipped.²³ In respondentia the obligation to repay the advance arises on the safe arrival of the cargo, even if the vessel on which it was originally shipped has herself been lost.²⁴ The possessory lien of the shipwright for repairs does not extend to the cargo.²⁵ In order that an instrument of respondentia should be valid *quoad* the cargo, it is essential to prove that the advance is for the benefit of the cargo.²⁶ Such benefit is, however, generally less capable of proof than benefit to the ship. Thus, repairs benefit the ship more directly than the cargo, and in the event of damage to the ship it is generally practicable to forward the cargo by another vessel or to sell it on the spot should such a course appear to be more advantageous. Since it is an essential of respondentia that some benefit should accrue to the cargo, the cargo owner can in no case incur liability beyond its value.¹ If no benefit accrues to the cargo, the owner of the ship is bound to indemnify the owner of the

¹⁸ Bell, Comm. i., 535.

¹⁹ *The "Chioggia,"* 1898, P. 1.

²⁰ *The "Great Pacific,"* 1869, 2 P.C. 516.

²¹ *The "Ripon City,"* 1897 P. 226, Gorell Barnes, J., at 245.

²² *The "Gaetano and Maria,"* 1882, 7 P.D. (C.A.) 137.

²³ *The "Jonathan Goodhue,"* 1858, Swa. 355.

²⁴ Bell, Comm. i., 536.

²⁵ *Jacobsen v. Hansen*, 1850, 12 D. 762.

²⁶ *The "Gratudine,"* 1801, 3 C. Rob. 240.

¹ *Jacobsen v. Hansen*, *supra*; *Nostra Senora Del Carmine*, 1854, 1 Spinks, 303.

cargo if it is arrested and sold by the lender in security of the advance.² The duty of the master to communicate with the owners of the property applies with special force in the case of respondentia.³ If their consent is withheld, a bond of respondentia is invalid *quoad* the cargo.⁴ Where, however, instructions are asked for and no reply is received, the bond may be valid.⁵ Rights under a bond of respondentia require to be formally transferred, and do not pass with an assignation of the bill of lading.⁶

Law to be Applied.—The contract is governed by the law of the flag of the ship regarding which it is made, unless a contrary intention appears from the contract.⁷ When the advance is made repayable on the arrival of the vessel at a terminal port in England, a presumption arises that the law intended to govern is the general maritime law as applied in England.⁸

² *Anderston Foundry Co. v. Law*, 1869, 7 M. 836.

³ *Kleinwort, Cohen & Co. v. Cassa Maritima of Genoa*, 1877, 2 A.C. 156.

⁴ *Dymond v. Scott*, 1877, 5 R. 196.

⁵ *The "Bonaparte"*, 1851, 8 Moo. P.C.C. 459.

⁶ *Ranking & Co. v. Tod*, 1870, 8 M. 914.

⁷ *The "Gaetano and Maria"*, 1882, 7 P.D. (C.A.) 137.

⁸ *Cargo ex "Hamburg"*, 1864, 2 Moo. P.C.C. 289.

CHAPTER IV.

DAMAGE BY COLLISION.

Jurisdiction: (a) In Claims for Damage to Property.—

It has been pointed out that in claims for damage done by a ship the Scottish Courts exercise their Admiralty jurisdiction, and that "it is impossible to say that there is "any peculiarity in our jurisprudence in this department "which distinguishes it from the maritime law of other nations, "or in particular from the Admiralty law of England."¹ It has further been expressly held that since the maritime law of Scotland is the same as that of England there is a maritime lien in Scots law for such damage.² In both cases the reference is to damage to property, and claims for damage to persons occupy a special position. It may be assumed, therefore, that damage done to property by a ship has the same meaning in Scots as in English law, that in claims for such damage the Scottish Courts may exercise their Admiralty jurisdiction, and accordingly that in them Admiralty procedure may be followed and proceedings *in rem* taken. This right is of value where it is desired to enforce a maritime lien. In maritime law damage done by a ship means damage done by a ship where she is herself the instrument of the damage and the active cause of it, and not damage done by the acts of the crew when not engaged in navigating her.³ To establish a claim for such damage it is not necessary that the ship should have been in actual contact with another ship. Thus such a claim may arise where one vessel has borne down on another and compelled her to slip her anchor to avoid collision,⁴ or has gone too fast in narrow waters and thereby caused a swell whereby another vessel has been sunk,⁵ or has been improperly left in the fairway, thereby causing another vessel to strand in avoiding her,⁶

¹ *Boettcher v. Carron Co.*, 1861, 23 D. 322, Lord Justice-Clerk, at 330.

² *Currie v. M'Knight*, 1896, 24 R. (H.L.) 1.

³ *Currie v. M'Knight*, *supra*.

⁴ *The "Port Victoria"*, 1902, P. 26.

⁵ *The "Batavier"*, 1854, 9 Moo. P.C.C. 286, at 297.

⁶ *The "Industrie"*, 1871, 3 Adm. & Ec. 303, at 307.

or has by improper navigation compelled another ship to alter course and thereby damage a third ship.⁷ It is also unnecessary that the damage should have been done to another ship, and the claim may arise for damage done by a ship to property other than ships, as in the case of damage to a pier,⁸ or to a landing stage,⁹ and it is probable that the claim arises in cases of damage done by a ship to property of any kind. It has, however, not yet been expressly held that a maritime lien arises in all such cases. In maritime law the primary meaning of damage is damage to property. Thus, it is only to damage of this nature that the rule of division of loss and other special rules of maritime law apply, and in the Merchant Shipping Act, 1894,¹⁰ in the Maritime Conventions Act, 1911,¹¹ and in other maritime statutes a clear distinction is drawn between claims for damage to property and those for loss of life or personal injury. In claims for damage to property not only is Admiralty procedure competent, but the law applied is entirely maritime.

(b) In Claims for Damage to Persons.—Claims for damage to persons are in a special position in respect that it is only since the passing of the Maritime Conventions Act, 1911,¹² that Admiralty procedure has been competent in them. Although formerly such claims might be brought in the Admiralty Division of the English High Court, it was necessary to proceed by a personal action and subject to the same rules as were in force in the Courts of common law.¹³ By the Maritime Conventions Act, 1911,¹⁴ however, it is now provided that “any enactment which confers on any Court Admiralty jurisdiction in respect of damage shall have effect as though references to such damage included references to damages for loss of life or personal injury, and, accordingly, proceedings in respect of such damages may be brought *in rem* or *in personam*.” In Scotland, by the Court of Session Act, 1830,¹⁵ an Admiralty jurisdiction in respect of damage by collision was conferred on the Court of Session and the

⁷ *The “Sisters,”* 1876, 1 P.D. 117, at 119.

⁸ *The “Zeta,”* 1893 A.C. 468, Lord Herschell, L.C., at 485.

⁹ *The “Veritas,”* 1901, P. 304, Gorell Barnes, J., at 311.

¹⁰ 57 & 58 Vict. c. 60.

¹¹ 1 & 2 Geo. V. c. 57.

¹² *Supra*.

¹³ *The “Molière,”* 1925, P. 27.

¹⁴ 1 & 2 Geo. V. c. 57, sec. 5.

¹⁵ 1 Will. IV. c. 69, secs. 21-29.

Sheriff Court, and, accordingly, proceedings in respect of loss of life or personal injury may now be brought either *in rem* or *in personam* both in Scotland and in England. Although Admiralty procedure has thus been made competent in such claims, the law applied in them both in Scotland¹⁶ and in England¹⁷ is not the maritime but the common law, and, accordingly, in them the rule of division of loss and other special rules of maritime law do not apply. It requires to be observed that sec. 5 of the Maritime Conventions Act, 1911,¹⁸ applies only to claims for damage by collision and not to claims which arise independently of fault on the part of the shipowner.¹⁹ Thus, it appears that it does not apply to claims against the shipowner to recover compensation paid by the claimant under the Workmen's Compensation Acts, since compensation is not damage but an indemnity.²⁰ Similarly, pensions and allowances voluntarily paid are not damage.²¹ In such cases, therefore, it is still necessary to proceed *in personam*.

Causes of Damage by Collision.—Damage by collision may arise from one of the following causes:—

(a) **Negligence.**—The rules of maritime and of common law as to what constitutes negligence causing collision are the same,²² and do not require separate consideration. It has, however, been pointed out that their practical application is necessarily different, and that "much greater care is reasonably required from the crew of a ship, who ought to keep "a look-out for miles, than from the driver of a carriage, "who does enough if he looks ahead for yards; much more "skill is reasonably required from the person who takes command of a steamer than from one who drives a carriage"²³; similarly, that "if it is two ships, they are to be governed "by the same rules of law and of evidence as if it was two "carts in the street; but when you come to apply that, you "must remember that a ship is a thing which cannot be "stopped in an instant, like a cart, and cannot be moved

¹⁶ *Kendrick v. Burnett*, 1897, 25 R. 82.

¹⁷ *The "Molière," supra*.

¹⁸ *Supra*.

¹⁹ *The "Molière," supra*.

²⁰ *M'Donald v. Dunlop & Co., Ltd.*, 1905, 7 F. 533.

²¹ *The "Amerika,"* 1917 A.C. 38.

²² *Owners of s.s. "Bogota" v. Owners of s.s. "Alconda,"* 1924 S.C. (H.L.) 66, Lord Atkinson, at 73.

²³ *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co., Ltd.*, 1880, 5 App.Cas. 876, Lord Blackburn, at 891.

“from one side to the other like a cart; and, when you have
 “to look out for miles instead of looking out for yards, the
 “application of the rules becomes very different.”²⁴ As
 applied to the navigation of a ship, negligence may be defined
 as failure on the part of those in control of the vessel to exer-
 cise reasonable care, caution, and maritime skill in any situa-
 tion of peril in which they may be placed.²⁵

(b) **Contributory Negligence.**—The rules of maritime and
 of common law are also the same as regards contributory negli-
 gence. Formerly the application of the common law rules
 were to some extent modified in Admiralty by the statutory
 presumption of fault which was deemed to arise in the case of
 infringement of the collision regulations,²⁶ or of failure to
 stand by another vessel in the event of collision.²⁷ These pre-
 sumptions have, however, been repealed,²⁸ and contributory
 negligence in such circumstances is now entirely a question of
 fact, namely, whether the breach of duty did in fact con-
 tribute to the collision.²⁹ In Admiralty, however, contribu-
 tory negligence is defined on somewhat broader lines than at
 common law, and liability is modified by the rule that, in situa-
 tions of sudden danger or emergency, a lower standard of skill
 is expected from persons in control of a ship than in ordinary
 circumstances, in any event, in cases where the danger or emer-
 gency has been caused by the wrongful act of another vessel.³⁰
 In collisions at sea, the principles to be applied have been thus
 summarised—“Upon the whole, I think that the question of
 “contributory negligence must be dealt with somewhat
 “broadly and upon common-sense principles, as a jury would
 “probably deal with it. And while, no doubt, where a clear
 “line can be drawn, the subsequent negligence is the only
 “one to look to, there are cases in which the two acts come
 “so closely together, and the second act of negligence is so
 “much mixed up with the state of things brought about by
 “the first act, that the party secondly negligent, while not
 “held free from blame under the ‘*Bywell Castle*’ rule,

²⁴ *Cayzer, Irvine & Co. v. Carron Co.*, 1884, 9 App.Cas. 873, Lord Blackburn, at 882.

²⁵ *The “Marpesia,”* 1872, 4 P.C. 212.

²⁶ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 419 (4).

²⁷ Merchant Shipping Act, 1894, sec. 422 (2).

²⁸ Maritime Conventions Act, 1911 (1 & 2 Geo. V. c. 57), sec. 4 (1).

²⁹ *Owners of s.s. “Haugland” v. Owners of s.s. “Karama,”* 1922, 1 A.C. 68, Lord Finlay, at 74.

³⁰ *The “Bywell Castle,”* 1877, 4 P.D. 219, applied in *Owners of s.s. “West Camak” v. Owners of s.s. “Rowan,”* 1924 S.C. (H.L.) 37.

“might, on the other hand, invoke the prior negligence as being part of the cause of the collision, so as to make it a case of contribution. And the Maritime Conventions Act, with its provisions for nice qualifications as to the quantum of blame and the proportions in which contribution is to be made, may be taken as to some extent declaratory of the Admiralty rule in this respect.”³¹ In damage by collision owing to the rule of division of loss where both ships are to blame, contributory negligence is not a ground for dismissing the action but for apportioning the loss. For this reason, liability is generally determined in cross-actions in which both parties attribute the entire blame to the other, and a plea of contributory negligence is seldom taken.

(c) **Inscrutable Fault.**—A collision may be due to inscrutable fault, *i.e.*, it may occur in such circumstances that, although there is evidence of fault, it is not clear to whom it is to be attributed.^{31a}

(d) **Act of God.**—In the event of the collision being due to the act of God, negligence is deemed to be absent, and, as used in maritime law, this expression has the same meaning as *damnum fatale* or *vis major* at common law.³² In Scots law an accident caused by *damnum fatale* is said to be due to inevitable accident.

(e) **Inevitable Accident.**—In maritime law the expression “inevitable accident” is used in a special sense as applying to cases where the damage, though not entirely unavoidable, is such that “the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill,”³³ as where in a situation of difficulty a vessel complies with the sailing rules but fails to take such further steps as might have avoided the accident.¹ In maritime law, therefore, it has a different meaning from that applied to it in Scots law. The doctrine appears to apply to cases where the wrongdoer is morally blameworthy as falling short of the best standards of seamanship, but his fault is not such as amounts to negligence in law. Regarding the doc-

³¹ *Admiralty Commissioners v. Owners of s.s. “Volute,”* 1922, 1 A.C. 129, Lord Birkenhead, L.C., at 136, 144.

³¹ See *infra*, p. 170.

³² Bell, Comm. i., 579; *Nugent v. Smith*, 1876, 1 C.P.D. 19, 423.

³³ *The “Virgil,”* 1843, 2 W. Rob. 201, Dr. Lushington, at 205.

¹ *The “Marpesia,”* 1872, 4 P.C. 212.

trine, it has been observed that "it is a head of law well known and distinguished from the case of mere negligence," and, "though it may not be philosophically correct, answers its purpose."² The extent to which it may be said to be the law in Scotland is uncertain. In Scotland in cases under the edict, "*Nautæ caupones, stabularii*," the expression "inevitable accident" appears to have a wider significance approximating more closely to its meaning in English maritime law than it has in other branches of law.³ In the Court of Session, however, the doctrine of "inevitable accident," as understood in maritime law, has never been directly adopted, although similar results have been reached on different grounds. Thus, in the case of a vessel breaking adrift in harbour and fouling another, the offending vessel has been held to be innocent, on the ground that the proximate cause of the collision was the negligence of the harbour authorities in failing to supply proper moorings.⁴ In England such a collision would be held to be due to inevitable accident. In the Sheriff Court, however, the doctrine has been repeatedly adopted, and it has been observed that "*vis major* is something more forceful and different from what is commonly called inevitable accident, which may occur without any exceptional upheaval of nature . . . *Vis major* and inevitable accident, however, are often closely related, and, in maritime causes, are frequently combined."⁵ When a collision is due to inevitable accident, negligence is deemed to be absent and the loss lies where it falls.⁶

Incidence of Loss.—In general the incidence of loss is the same as at common law, and it is only where both ships are found to blame or the damage is due to inscrutable fault that it requires special consideration.

(a) Where both Ships are to Blame: Rule of Division of Loss.—Where both ships are to blame, in place of the loss lying where it falls, as at common law, the principle of contribution

² *The "Schwan": The "Albano,"* 1892, P. (C.A.) 419, Lord Esher, M.R., at 428.

³ *Mustard v. Paterson*, 1923 S.C. 142, Lord Hunter, at 152; Bell, Prin., sec. 237, note (a).

⁴ *Owners of s.s. "Toward" v. Owners of Ship "Turkestan,"* 1885, 13 R. 342.

⁵ *Greenwood v. Buchanan*, 1888, 5 Sh.Ct.Rep. 127; *Cayfero v. Alex. Stephen & Sons*, 1893, 9 Sh.Ct.Rep. 193; *MacBrayne v. Smith & Ritchie*, 1904, 20 Sh.Ct.Rep. 301; *T. J. Brocklebank, Ltd. v. Dublin Dockyard Co., Ltd.*, 1924, 40 Sh.Ct.Rep. 140, Sheriff Fyfe, at 142.

⁶ *The "Marpesia,"* 1872, 4 P.C. 212.

is applied, and the loss is apportioned between the wrongdoing vessels. Formerly it was apportioned equally. "By the law of the Admiralty, as it is called, if the owner of one ship brings an action against the owner of another ship for damage by collision, and both vessels be found to blame, the party proceeding recovers only a moiety of his damage; if there is a cross-action the damages are divided, each party recovering half his own loss."⁷ It has been pointed out that the rule of division of loss bears no relation to the principle of contribution at common law, where a joint obligation is incurred to a third party. "In the division of loss arising from the collision of ships through joint fault, there is no third party to whom the owners of the vessels are jointly liable, and the duty of sharing the loss between them is founded on no strict rule of legal obligation, but rests for its authority entirely on principles of equity and consideration of mercantile expediency."⁸ The rule applies also to claims by the owner of the cargo in one ship against the owner of the other ship, in which case "the practice of the Court of Admiralty appears to have been uniform, that where both ships are to blame . . . the owners of cargo, equally with the owners of ships, recover a moiety of their damage."⁹ It does not, however, apply to claims by passengers or by those members of the crew who are not themselves guilty of negligence, since the doctrine of identification of a carrier with his passengers, as laid down in *Thorogood v. Bryan*,¹⁰ has been overruled.¹¹ In any event, it has never been the law in Scotland.¹² In such cases, therefore, the passengers or crew or their representatives are entitled to recover the whole amount of their damage from the owners of the other vessel. The decision in the case of the "*Milan*" is apparently inconsistent, not only with the decision in the case of the "*Bernina*," but also with the common law of Scotland, but it has been expressly affirmed by the House of Lords,¹³ and appears to be based, not on the doctrine of identification of the

⁷ *The "Milan,"* 1861, Lush. 388, Dr. Lushington, at 398.

⁸ *Clyde Shipping Co. v. Glasgow and Londonderry Steam Packet Co.*, 1859, 21 D. 898, Lord Justice-Clerk, at 900.

⁹ *The "Milan," supra*, Dr. Lushington, at 401.

¹⁰ 1849, 8 C.B. 115.

¹¹ *The "Bernina (No. 2),"* 1887, 12 P.D. 58; 1888, 13 App.Cas. 1.

¹² *Adams v. Glasgow and South-Western Railway Co.*, 1875, 3 R. 215.

¹³ *The "Drumlanrig,"* 1911 A.C. 16.

cargo owner with his ship, but merely on established Admiralty practice. The rule is confined to cases of delict, and does not extend to breaches of the contract to carry goods.¹⁴

Effect of Maritime Conventions Act, 1911.—The rule of division of loss is in some respects modified by the Maritime Conventions Act, 1911,¹⁵ which provides—

“ Sec. 1 (1)—Where by the fault of two or more vessels
“ damage or loss is caused to one or more of those vessels,
“ to their cargoes or freight, or to any property on board, the
“ liability to make good the damage or loss shall be in pro-
“ portion to the degree in which each vessel was in fault.”

“ Sec. 2.—When loss of life or personal injuries are suf-
“ fered by any person on board a vessel owing to the fault
“ of that vessel and of any other vessel or vessels, the lia-
“ bility of the owners of the vessels shall be joint and
“ several.”

“ Sec. 3.—When loss of life or personal injuries are
“ suffered by any person on board a vessel, owing to the fault
“ of that vessel and any other vessel or vessels, and a propor-
“ tion of the damages is recovered against the owners of one
“ of the vessels which exceeds the proportion in which she
“ was in fault, they may recover by way of contribution the
“ amount of the excess from the owners of the other vessel
“ or vessels to the extent to which those vessels were respec-
“ tively in fault.”

“ Sec. 5.—Any enactment which confers on any Court
“ Admiralty jurisdiction in respect of damage shall have
“ effect as though references to such damage included refer-
“ ences to damages for loss of life or personal injury, and,
“ accordingly, proceedings in respect of such damages may
“ be brought *in rem* or *in personam*.”

(1) *Proportional Division of Loss.*—Regarding the effect of these provisions, it has been pointed out that “sec. 1 alters the Admiralty rule as to division of loss

¹⁴ *The “Bushire,”* 1885, 5 Asp. M.L.C. 416.

¹⁵ 1 & 2 Geo. V. c. 57.

“by substituting for equality of division a division into proportions based on degree of fault, but preserves the earlier limitation of the rule itself to cases of damage to ship, cargo, freight, and property on board,” and, accordingly, it has been held that the provision of sec. 3 regarding contribution between the wrongdoers in respect of loss of life or personal injuries only applies to damages recoverable by action, and not to claims for compensation arising out of statute and independent of fault on the part of the shipowner, such as a claim for indemnity for compensation paid under the Workmen’s Compensation Act, 1906. It was further observed that “secs. 2, 3, and 5 of the Act are concerned with damages and with actions therefor. No mention is made of compensation or of claims for compensation arising independently of fault in a shipowner, and no right of contribution or indemnity is conferred in respect of payments made by way of compensation.”¹⁶

Sec. 1 further provides that, “if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.”¹⁷ It is not the practice of the Court to draw fine distinctions regarding the relative degree of fault, and liability is generally apportioned in proportions of thirds, quarters, or fifths, and the general rule to be applied is that, where “the evidence does not establish that a clear preponderance of culpability rests upon one ship, the division of the damage should be half and half.”¹⁸ In the event of unequal apportionment, the right of the cargo owner to recover damages is in proportion to the degree in which the party sued is held to be in fault.¹⁹

(2) *Damage or Loss*.—The words “damage or loss,” as used in sec. 1, have been held to include any sum which an injured ship may be required to pay to an innocent third vessel as well as the damage sustained by the ship itself, since “the word ‘loss’ is wide enough to include that form of pecuniary prejudice which consists in compensating third parties for wrong done to them by the fault of persons for whose conduct the party prejudiced must answer.”²⁰ It is doubtful,

¹⁶ *The “Molière,”* 1925, P. 27, Roche, J., at 33.

¹⁷ Sec. 1 (1) (a).

¹⁸ *The “Peter Benoît,”* 1915, 13 Asp. M.L.C. 203, Lord Atkinson, at 203.

¹⁹ *The “Umona,”* 1914, P. 141.

²⁰ *The “Cairnbahn,”* 1914, P. (C.A.) 25, Lord Sumner, at 33.

however, whether they are intended to cover claims for loss of life or personal injury, since provision is expressly made for such claims elsewhere in the Act.²¹ Whether or not it can be said that the rule of division of loss was confined under the former practice to the case of actual collision between two wrongdoing vessels, the opinion has been expressed that, under the provisions of the Maritime Conventions Act, which are "wider in their application than the Admiralty rule," it is unnecessary that the vessels responsible for the damage or loss should themselves have been in collision.²²

(3) *Freight and other Damages*.—For the purposes of the Act, "the expression 'freight' includes passage money and hire, and references to damage or loss caused by the fault of a vessel shall be construed as including references to any salvage or other expenses consequent upon that fault recoverable at law by way of damages."²³

(4) *Exceptions to Rule*.—Sec. 1 further provides that "nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed"²⁴; and that "nothing in this section shall affect the liability of any person under a contract of carriage, or any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any contract, or by any provision of law, or as affecting the right of any person to limit his liability in the manner provided by law."²⁵ The words "exempted by any contract" are intended to apply to the case of a claim by the owner of cargo damaged in a collision between two vessels, where both are held to blame. Under the law prior to the Act, it had been held that he could only recover from the ship-owner half the amount of the damage, namely, the portion which attached to the non-carrying vessel, the claim for the other portion being defeated by the negligence clause in the bill of lading under which the goods were carried.¹ This limitation is expressly preserved by the Act. The words "exempted . . . by any provision of law" applied to

²¹ Secs. 2, 3; *The "Cedric,"* 1920, P. 193, Hill, J., at 197.

²² *The "Cairnbahn,"* *supra*, Lord Parker of Waddington, at 32.

²³ Sec. 1 (2).

²⁴ Sec. 1 (1) (b).

²⁵ Sec. 1 (1) (c).

¹ *Chartered Bank of India v. Netherlands India Steam Navigation Co.*, 1883, 10 Q.B.D. 521.

the defence of compulsory pilotage until its abolition on 1st January, 1918, by the Pilotage Act, 1913.²

(5) *Contribution between Co-Delinquents.*—The provisions regarding joint and several liability³ and contribution,⁴ for loss of life or personal injury, in any event, in cases “which involve no moral offence on the part of the delinquent,”⁵ are merely declaratory of the common law of Scotland. Certain qualifications, however, of these provisions are contained in the provisos attached to them. Actions to enforce contributions in respect of damages for loss of life or personal injury require to be commenced within one year from date of payment.⁶ Under the former practice, the rule of division of loss did not apply to the case of two ships being in fault for a collision with a third, and the innocent ship might recover the whole loss from either or both.⁷ Under the Act the rule is similar.⁸

(b) *In Inscrutable Fault.*—Where the damage is due to inscrutable fault it is not entirely settled how the loss will be apportioned. Such cases are of necessity rare, and there is an entire absence of decision in Scotland. Bell is of the opinion, on the grounds both of equity and of the general principles of maritime law, that there should be contribution between the two vessels.⁹ In England, however, it has been held that the loss lies where it falls,¹⁰ and this decision will probably now be followed in Scotland.

Persons Liable for Damage: (a) The Actual Wrongdoer.—The person primarily liable for damage is the actual wrongdoer, whether he be the owner navigating his own vessel, the master, a certificated officer, an ordinary seaman, or the pilot. In the majority of cases the actual wrongdoer is the master. The standard of care demanded from him is that “he must take all such precautions as a man of ordinary prudence and skill exercising a reasonable foresight would use to avert danger in the circumstances in which he may happen to be

² 2 & 3 Geo. V. c. 31, sec. 15.

³ Sec. 2.

⁴ Sec. 3.

⁵ Cf. *Palmer v. Wick and Pulteneytown Steam Shipping Co., Ltd.*, 1894, 21 R. (H.L.) 39, Lord Watson, at 46.

⁶ Sec. 8.

⁷ *Owners of s.s. “Devonshire” v. Owners of Barge “Leslie,”* 1912 A.C. 634.

⁸ *The “Cairnbahn,”* 1914, P. (C.A.) 25.

⁹ Comm. i., 581.

¹⁰ *The “Olympic” v. H.M.S. “Hawke,”* 1913, P. (C.A.) 214.

“placed.”¹¹ When the wrongdoer is the pilot, his liability is limited to the amount of his bond, together with the amount payable to him in respect of the voyage on which he was engaged when the liability was incurred.¹² The actual wrongdoer is, however, not usually entitled to limit his liability, but, being in most cases a seafaring man of small means, he is seldom worth suing, and a substantial remedy must therefore generally be sought against the owner or against the ship itself.

(b) **The Owner:** (1) *Where his Servants are in Control of the Navigation.*—The owner of the wrongdoing ship incurs no liability as owner of the vessel, but merely as the actual wrongdoer, or as the employer of the actual wrongdoer.¹³ In most cases he is in fact the employer of the wrongdoer, and *prima facie* this is the case, but the presumption may be rebutted by circumstances, as by proving that the actual employer of the wrongdoer is a shipwright in whose charge the vessel has been placed for the purpose of repair¹⁴; or a charterer to whom the vessel has been demised¹⁵; or a Government by whom the vessel has been requisitioned.¹⁶ If, however, the owner *ex gratia* settles a claim for damage caused by the servants of a charterer, he has no right of relief against him.¹⁷ The owner is only liable for the negligence of his servant within the scope of his employment, and wilful, malicious, or criminal acts are seldom within the scope of such employment,¹⁸ but in exceptional circumstances they may be.¹⁹ He is, however, not liable for the negligence of one member of the crew causing loss to other members, his liability being then excluded by the doctrine of common employment,²⁰ even in cases where the wrongdoer is acting within the scope of his employment.²¹ The doctrine of common employment, however, never applies as between the crew of one ship and that

¹¹ *The “William Lindsay,”* 1873, 5 P.C. 338, Sir M. Smith, at 343, applied in *Henderson v. Noble*, 1897, 5 S.L.T. 177.

¹² The Pilotage Act, 1913 (2 & 3 Geo. V. c. 31), sec. 35.

¹³ *Simpson & Co. v. Thomson*, 1877, 5 R. (H.L.) 40, Lord Blackburn, at 48.

¹⁴ *River Wear Commissioners v. Adamson*, 1877, 2 A.C. 743, Lord Blackburn, at 748.

¹⁵ *Baumwoll Manufactur von Carl Scheibler v. Furness*, 1893 A.C. 8.

¹⁶ *The “Sylvan Arrow (No. 2),”* 1923, P. 220.

¹⁷ *Clarke v. Scott*, 1896, 23 R. 442.

¹⁸ *Currie v. McKnight*, 1896, 24 R. (H.L.) 1.

¹⁹ *Reg. v. Keyn*, 1876, 2 Ex.D. 63.

²⁰ *Leddy v. Gibson*, 1873, 11 M. 304.

²¹ *Downie v. Connell Bros., Ltd.*, 1910 S.C. 781; *Hedley v. Pinkney Shipping Co., Ltd.*, 1894 A.C. 222.

of another ship in cases where both ships belong to the same owner. Accordingly, in such cases the owner may be liable for loss occasioned by the wrongdoing ship to the crew of the injured ship, in spite of the fact that the crews of the two ships are fellow-servants.²² In accordance with the principle of common law, the owner is entitled to recover from the actual wrongdoer, being his servant, damage due to his negligence. By the Harbours, Docks, and Piers Clauses Act, 1847,²³ which is incorporated in a number of private Acts, the owner is liable for damage to harbour and other similar works. In this case, however, his liability is exceptional, in respect that it attaches to him as owner whether or not he is in fact the employer of the actual wrongdoer.²⁴

Certain exceptions are admitted to the liability of the owner of a vessel navigated by his servants. Thus, where a ship is under the orders of a harbourmaster, the owner is not liable for damage done by her, provided that his servants are not guilty of contributory negligence. Within his jurisdiction, the authority of the harbourmaster over those in charge of the ship is unlimited, even although the latter possess superior local knowledge and maritime skill.²⁵ Similarly, on the ground of superior orders, the owner of a vessel in the employment of the Government as a transport is not liable for damage done to another transport in execution of the positive orders of the naval officer in charge of the convoy.¹ The Admiralty Commissioners are not liable for damage caused by His Majesty's ships.²

(2) *Where a Licensed Pilot is in Control of the Navigation.*—Formerly in areas where pilotage was compulsory the pilot was not the servant of the owner, and the owner was not responsible for his fault.³ The Pilotage Act, 1913, however, now provides that “notwithstanding anything in any public “or local Act, the owner or master of a vessel navigating under “circumstances in which pilotage is compulsory shall be “answerable for any loss or damage caused by the vessel or

²² *Grangemouth and Forth Towing Co., Ltd. v. “River Clyde” Co., Ltd.*, 1905, 16 S.L.T. 638.

²³ 10 Vict. c. 27, sec. 74.

²⁴ *Mersey Docks and Harbour Board v. Hay*, 1923 A.C. 345.

²⁵ *Rennie v. Magistrates of Kirkcudbright*, 1892, 19 R. (H.L.) 11.

¹ *Hodgkinson v. Fernie*, 1857, 2 C.B. (N.S.) 415.

² *The “Athol,”* 1842, 1 W. Rob. 374.

³ *Steamship “Beechgrove” Co., Ltd. v. Aktieselskabet “Fjord,”* 1916 S.C. (H.L.) 1, Lord Atkinson, at 12.

"by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory."⁴ If a voluntary pilot is in control of the navigation, it has been held that he is a servant of the owner and a fellow-servant of the master and crew, and that the owner is liable for his fault within the scope of his employment, and that, therefore, the same rule now applies if the pilot is compulsory.⁵ The Pilotage Act, 1913, appears to contemplate that the pilot shall take control of the navigation,⁶ although it makes no express provision to that effect, and it has been pointed out that the master is under no legal compulsion to resign the navigation to him.⁷ There is merely a presumption that he is in control in the absence of contrary evidence to the effect that his function is merely advisory.⁸ Hitherto it has been a general practice in British vessels to resign the navigation to the pilot, since thus the master, being no longer in control, the owner incurred no liability for his negligence, and by statute no liability arose for that of the compulsory pilot. Under the present rule, however, since this exemption no longer operates, it is possible that a practice which is generally followed in foreign vessels will be adopted, and control of the navigation will be retained in the hands of the master, in whose nautical skill and experience the owner has confidence, the pilot being employed merely as an expert adviser. It appears to follow, however, from the reasoning in the case of *Thom v. Owners of s.s. "Smerdis,"*⁹ that equally in this case the pilot is the servant of the owner.

(3) *Where the Vessel is a Wreck or Derelict.*—The liability of the owner may be affected, in the event of the abandonment of the vessel, by reason of the fact that on the wreck or loss of a vessel the possession and control of the vessel may be transferred to third parties, and that the crew may cease to be the servants of the owner.¹⁰ The meaning to be applied to the expression "wreck" is considered in the case of *The "Olympic": H.M.S. "Hawke."*¹¹ In the case of a wreck,

⁴ 2 & 3 Geo. V. c. 31, sec. 15 (i).

⁵ *Thom v. Owners of s.s. "Smerdis,"* 1925 S.C. 386.

⁶ Cf. secs. 11 (2), 44 (1) and (3).

⁷ *Steamship "Beechgrove" Co., Ltd. v. Aktieselskabet "Fjord,"* 1916 S.C. (H.L.) 1, Lord Buckmaster, L.C., at 9.

⁸ *The "Andoni,"* 1918, P. 14.

⁹ *Supra.*

¹⁰ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 153.

¹¹ 1913, P. (C.A.) 92.

the duty of using reasonable skill and care to ensure the safety of other vessels rests on the persons who have actual possession and control of the wreck, and, accordingly, where its possession and control have passed to harbour authorities, the liability of the owners for damage ceases, and no maritime lien attaches to the vessel, even although the owners have retained a certain interest in her.¹² It is probable that the duty of the owner to ensure the safety of other vessels ceases on abandonment,¹³ but before abandonment the master and crew must take all reasonable precautions to warn other vessels of the presence of the wreck, as by buoys and lighting it,¹⁴ and these signals must not be misleading.¹⁵ Certain statutory powers for the removal of wrecks within their area, for selling them to reimburse themselves out of the proceeds of the sale, and for holding the surplus in trust for the persons entitled thereto, are possessed by harbour conservancy and lighthouse authorities.¹⁶ The Clyde Lighthouse Trustees have similar powers, and the expenses of removal of a wreck so far as not recovered by the sale may be recovered from the master or owner of the ship.¹⁷ It has been held that the liability thus incurred is personal to the master or owner, and cannot be avoided by any transaction with the underwriters.¹⁸ A similar decision has been reached under the Harbours, Docks, and Piers Clauses Act, 1847.¹⁹ Under that Act it has also been held that liability for repayment of the expenses of removal rests on the owner, not at the time of the casualty, but on the owner at the time when the expenses were incurred,²⁰ and that the owner may be liable not only for the negligence of his servants, but also for a public nuisance caused by their fault.²¹ In the case of a derelict similar considerations apply. The abandonment must be without the intention of retaking possession, and must be the act of the master and crew themselves.²² To be effective it must be justified.²³

¹² *The "Utopia,"* 1893 A.C. 492.

¹³ *The "Snark,"* 1899, P. 74.

¹⁴ *Galloway v. Sims*, 1881, 18 S.L.R. 518.

¹⁵ *Anchor Line, Ltd. v. Dundee Harbour Trustees: Ellerman Lines, Ltd. v. Dundee Harbour Trustees*, 1922 S.C. (H.L.) 79.

¹⁶ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), secs. 530-534.

¹⁷ Clyde Lighthouses Act, 1880 (43 & 44 Vict. c. cxxxvii.), sec. 20.

¹⁸ *Clyde Lighthouses Trust v. Ship "Auchmountain," Ltd.*, 1893, 1 S.L.T. 94.

¹⁹ Sec. 56; *Earl of Eglinton v. Norman*, 1877, 3 Asp. M.L.C. 471.

²⁰ *The "Crystal,"* 1894 A.C. 508.

²¹ *The "Ella,"* 1915, P. 111.

²² *Bradley v. H. Newsom, Sons & Co.*, 1919 A.C. 16.

²³ *The "Blenheim,"* 1854, 1 Spinks, 285.

(c) **Co-owners.**—Co-owners may be either themselves wrongdoers or the employers of the actual wrongdoers, and in either event they are co-delinquents, and as such liable jointly and severally for damage by collision through negligence, and each may be sued separately for the full amount of the damage.²⁴ Their liability, however, arises only from participation in the joint adventure in the course of which the negligence occurred and their employment of the wrongdoer, and not in virtue of their co-ownership, since “liability for damages never arises “simply *ex dominio*.”²⁵ The Merchant Shipping Act, 1894, provides that “all sums paid for or on account of any loss or “damage in respect whereof the liability of owners is limited “under the provisions of the Merchant Shipping Act dealing “with limitation of liability,” and all costs “incurred in relation thereto, may be brought into account among part owners “of the same ship in the same manner as money disbursed for “the use thereof.”¹

(d) **Owners of Independent Ships.**—Similarly, in the case of damage through the negligent navigation of two or more independent ships, the owners are in Scotland in the position of co-delinquents and in England of joint tortfeasors, and in both cases are liable jointly and severally, and each may be sued separately for the full amount of the damage. Their rights and liabilities are now regulated by the Maritime Conventions Act, 1911.² The position of co-delinquents, however, and joint tortfeasors is not in all respects similar. Thus, in England persons are not joint tortfeasors merely because their independent wrongful acts have resulted in a single loss, and “there “must be a concurrence in the act or acts causing damage, “not merely a coincidence of separate acts which by their conjoined effect cause damage.”³ In Scotland, on the contrary, it is immaterial whether the acts of negligence are independent or not, provided that they both contribute to produce a single loss. Thus, where two vessels have each been guilty of entirely separate acts of negligence, the one by being in occupation of an improper berth, and the other by negligent navigation, with the joint result that two other innocent vessels are forced into collision with each other, it has been held that

²⁴ *Palmer v. Wick and Pulteneytown Steam Shipping Co., Ltd.*, 1894, 21 R. (H.L.) 39.

²⁵ *M'Gee v. Anderson*, 1895, 22 R. 274, Lord Trayner, at 277.

¹ Sec. 505.

² 1 & 2 Geo. V. c. 57, see *supra*, p. 170.

³ *The "Koursk,"* 1924, P. (C.A.) 140, Sargent, L.J., at 159.

the owners of the wrongdoing vessels are nevertheless in the position of co-delinquents.⁴ English decisions on joint tort may therefore be misleading.

(e) **Cargo Owner.**—The cargo owner incurs no direct liability for damage, since he has no control of the navigation of the ship. Where, however, the freight is liable, the cargo may be arrested in order to force the cargo owner to pay the freight into Court, and he may thus be made indirectly liable.⁵

Liability of Ship: Maritime Lien.—The liability of the ship, apart from that of the owner, being dependent on the attachment of a maritime lien, is contingent on her surviving the collision. The origin of this lien has been traced to the arrestment of the ship as a mere step in procedure in order to obtain security that the judgment of the Court should be satisfied.⁶ It was first definitely declared to exist by a decision of the Privy Council in 1851.⁷ To enable it to attach the ship herself must be the instrument of the damage, and not merely the individuals on board her.⁸ It may attach independently of actual collision between ships, as in the case of collision of the ship with a landing stage.⁹ It attaches to ships detained by harbour authorities for damage to harbour or other similar works under the Harbour, Docks, and Piers Clauses Act, 1847, the provisions of which are also incorporated in a number of private Harbour Acts.¹⁰ Whether it may attach to a ship which without actual contact by her negligent navigation causes a collision between two other ships is as yet undetermined. It attaches to the tackle, apparel, and furniture of the vessel, as well as to the hull,¹¹ and to the last fragments of the same,¹² but not to the wearing apparel of passengers.¹³ It attaches also to the freight which ship was engaged in earning at the time of the collision,¹⁴ but not to the cargo, although the latter may be arrested to enforce pay-

⁴ *Ellerman Lines, Ltd. v. Clyde Navigation Trustees*, 1909 S.C. 690; 1911 S.C. 122, Lord Johnston, at 133.

⁵ *The "Flora,"* 1866, 1 Adm. & Ec. 45.

⁶ *The "Dupleix,"* 1912, P. 8, Evans, J., at 13.

⁷ *The "Bold Buccleuch,"* 1851, 7 Moo. P.C.C. 267.

⁸ *Currie v. M'Knight*, 1896, 24 R. (H.L.) 1.

⁹ *The "Veritas,"* 1901, P. 304.

¹⁰ *The "Merle,"* 1874, 2 Asp. M.L.C. 402.

¹¹ *The "Alexander,"* 1811, 1 Dods, 278.

¹² *The "Neptune,"* 1824, 1 Hagg. Adm. 227.

¹³ *The "Willem III.,"* 1871, 3 Adm. & Ec. 487.

¹⁴ *The "Orpheus,"* 1871, 3 Adm. & Ec. 308.

ment into Court of the freight.¹⁵ It is not affected by a sale of the ship to a *bona fide* purchaser without notice,¹⁶ nor by the owner's death or bankruptcy, nor, if the ship is owned by a company, by a winding-up order against the company.¹⁷ It does not attach to a ship which at the time of the collision is the property of a sovereign power.¹⁸ Such ships cannot be arrested even though employed in trade,¹⁹ and a similar immunity extends to vessels under requisition by the Government.²⁰ How far it may attach independently of any personal liability of the owner or of his servants is uncertain, and there is a conflict of authority. The general conclusion has been reached that "the ship may be liable in Admiralty where no "damage could be recovered at law against the general owner," and that, "notwithstanding *dicta* to the contrary, a person "injured by a collision can in some cases recover against the "owner of the ship that has done the damage by proceedings "in Admiralty *in rem* when he could not recover at common "law."²¹ The lien is inchoate from the moment of collision,¹ and is discharged by satisfaction of the debt, by operation of statute in certain events,² by the finding of security for the debt, or by sale of the ship by order of the Court.

Persons Entitled to Recover Damages.—All persons injured by the fault of one or both ships, who have not themselves or through their agents or servants been guilty of negligence, and who are not in common employment with the wrongdoer, are entitled to recover damages. Thus, the owner of the damaged ship, who need not be the registered owner, but may be a beneficial owner, may recover.³ Since the right of recovery is not an incident of property in the vessel, underwriters may recover if surrogated to the rights of the owner whom they have indemnified. They can, however, acquire no higher right than that of the owner, and in cases where owner cannot enforce a claim, neither can the underwriters, as in the event of the collision of two ships belonging to the

¹⁵ *The "Flora,"* 1866, 1 Adm. & Ec. 45.

¹⁶ *The "Bold Buccleuch," supra.*

¹⁷ *The "Cella,"* 1888, 13 P.D. 82.

¹⁸ *The "Tervaete,"* 1922, P. (C.A.) 259.

¹⁹ *The "Porto Alexandre,"* 1920, P. (C.A.) 30.

²⁰ *The "Broadmayne,"* 1916, P. (C.A.) 64.

²¹ Marsden's *Collisions at Sea*, 8th edn., 84, 98.

¹ *The "Bold Buccleuch," supra.*

² Cf. Maritime Conventions Act, 1911 (1 & 2 Geo. V. c. 57), sec. 8.

³ *The "Ilos,"* 1856, Swa. 100.

same owner. The action requires to be in the name of the owner.⁴ Persons carried in the ship which is herself in fault can recover if they are not themselves guilty of negligence, since the doctrine of identification of the carrier with the passengers does not apply in Admiralty,⁵ and in any event has never been the common law in Scotland.⁶ Accordingly, the passengers and master and crew of either ship may recover. The doctrine, however, of common employment applies to the effect of preventing the master and crew recovering for the negligence of one of themselves from the owner of their own ship,⁷ but, where both vessels belong to the same owner, the masters and crews of the two vessels are not in common employment to the effect of excluding the right of recovery, since ships have identities separate from that of their owners, and risk of injury from the negligence of the crew of one vessel is not an incident of the employment of the crew of the other.⁸ The rights of the master and crew are entirely distinct from those of the owners. Thus, a claim may be too remote in the case of the owners, but not in that of the master and crew, even in cases where they have sued jointly in the same action.⁹ Similarly, each member of the crew has a right distinct from that of the others.¹⁰ Owners of the cargo on board either vessel may recover, but their right is limited by the operation of the rule of division of loss where both ships are to blame. Thus, they may only recover a proportion of the loss from the opposing ship, but may recover the remainder from the owners of their own ship.¹¹ Since affreightment is founded on deposit, the cargo owner has the rights of a depositor against the owner of the vessel in which his goods are carried.

Conjunction of Actions.—The question whether actions of damage by collision are suitable for conjunction is one of circumstance. The claims all arise out of the same event, and may at times be very numerous, as in the case of damage to a general ship or to a passenger ship. Since conjunction is conducive to expedition and economy, it will generally be allowed, other considerations being equally balanced. It does not pre-

⁴ *Simpson & Co. v. Thomson*, 1877, 5 R. (H.L.) 40, Lord Blackburn, at 49.

⁵ *The "Bernina" (No. 2)*, 1888, 13 A.C. 1.

⁶ *Adams v. Glasgow and South-Western Railway Co.*, 1875, 3 R. 215.

⁷ *Leddy v. Gibson*, 1873, 11 M. 304.

⁸ *The "Petrel"*, 1893, P. 320.

⁹ *Main v. Leask*, 1910 S.C. 772.

¹⁰ *Gatt v. Angus Shipping Co., Ltd.*, 1907, 14 S.L.T. 749.

¹¹ *The "Milan"*, 1861, Lush. 388.

clude the amount of damages being assessed separately in each case. It may be allowed where the main subject of the inquiry is the same, even in cases where the grounds of claim are different. Thus, it has been allowed where separate actions were raised by persons claiming as the dependents, tutors, and executors of seamen.¹² The chief consideration which will induce the Court to refuse to conjoin is the possibility of any of the parties being prejudiced by the conjunction. Conjunction is in general preferable to sisting all the actions except one, since the single action may at any time be settled. It is usually allowed after the records have been closed.¹³ As against the owners of another vessel the existence of liability is frequently determined in an action brought by the owners of the injured ship against the owners of the wrongdoing ship. Other persons aboard the injured ship generally accept the finding in that action as conclusive of the existence of liability on the part of the wrongdoing ship, but it is not *res judicata* for any person who is not a party to the action, and he may elect to have the question of liability tried again in a separate action. Thus, where an action had been raised by the shipowner and there had been a finding of both ships to blame, the consequence of which for an injured person, if she had accepted it, would have been that she would have failed to recover damages, she elected to raise a separate action, and obtained a finding that the other ship was entirely to blame, in consequence of which she recovered the entire amount of her claim.¹⁴ When the finding in the action by the shipowner is accepted by the other injured persons as conclusive, the actions by them are not directed to establishing negligence on the part of the wrongdoing ship, but merely to establishing their right to recover damages and the amount recoverable. As against the owners of their own vessel, actions of damages raised by injured persons are generally based on breach of the contract of affreightment, and are not, therefore, properly actions for damage by collision. As the terms of the contract generally vary in individual cases, such claims are not generally suitable for conjunction, but they may be heard jointly, or, where convenient, in groups divided according to the nature of the contracts. In a case where damage had been done by two ships to a third and separate actions had been raised

¹² *Gatt v. Angus Shipping Co., Ltd.*, 1907, 14 S.L.T. 749.

¹³ *Gatt v. Angus Shipping Co., Ltd.*, *supra*.

¹⁴ *Kerr v. Screw Collier Co., Ltd.*, 1907, 15 S.L.T. 444.

against each and the harbour authorities called as defenders in both, a plea that two actions against the harbour authorities for a single allegation of fault were incompetent was repelled on the ground that no other procedure could be followed.¹⁵

Cross-actions.—Owing to the rule of division of loss where both vessels are found to blame, the question of liability for damage by collision is usually determined in cross-actions, each vessel imputing the whole negligence to the other. In such cases, to avoid the inconvenience and expense of two inquiries into the same circumstances, it is the general practice to conjoin the two actions and to hear them jointly and on the same evidence. Where both vessels are found to blame, and the loss is in consequence divided, the question whether two cross liabilities or only a single liability has been incurred may be of importance, as in the event of the bankruptcy of either party before decree has been pronounced or of the statutory limitation of liability being claimed. It has been pointed out that in substance the cross-actions form only a single action, and in practice only one payment is made, namely, that of the balance due from one ship to the other. Accordingly, the practice under the rule of equal division of loss was to regard only a single liability as arising. “The two claims arise out of one and the same accident. They are determined in one and the same Court, and they depend on one and the same question, viz., were both or only one of the parties to blame? and that question is determined once for all between the same parties. And the amount of the damages is also determined by the same Court and between the same parties. Even if the course of pleading had always been, as it appears latterly to have been, to condemn each separately, I should still say that they were in substance at least not distinct and separate actions.” The practice followed, therefore, was to give only a single decree for “the balance due, which is determined by taking a moiety of the difference of the aggregate loss beyond the point of equality.”¹⁶ The same practice appears to be applicable also to the rule of unequal division of loss now in force.

Proof or Jury Trial.—Actions for damage by collision are no longer regarded as suitable for jury trial, although such

¹⁵ *Lindoe v. Reid*; *Lindoe v. Geddes*, 1908, 15 S.L.T. 1044.

¹⁶ *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co.*, 1882, 7 A.C. 795, Lord Blackburn, at 820, Lord Selborne, L.C., at 801.

trial is not incompetent, and in certain circumstances may be appropriate, as in cases "involving pure question of fact, such as whether or not a certain course has been followed."¹⁷ In practice, however, they are now almost invariably heard by a judge sitting either alone or with a nautical assessor, and it has been pointed out that if the contrary rule were generally followed, it would be a serious obstacle to the trial of collision actions in the Sheriff Courts, where trial of such actions by jury is incompetent.¹⁸ Damage, however, more particularly damage for loss of life, or personal injury, where liability has already been admitted, is occasionally assessed by a jury.

Pleading.—In actions for damage by collision it frequently happens that the evidence at the trial does not support the case on record. This may be due to a variety of reasons. Thus, it has been pointed out that "evidence as to the true cause of the collision of ships is always of difficult access. The accident generally happens in the darkness of night, or is accompanied with confusion and agitation and attended by a feeling of irritation or of self-interest which poisons the sources of evidence."¹⁹ Similarly, it has been observed that "in all accidents of this kind very great confusion must inevitably prevail on board the vessels in collision; and it would be unreasonable to expect that the minor incidents and circumstances should be noted with any very particular accuracy or minuteness."²⁰ For these reasons it is always a matter of difficulty to speak with precision regarding events which have taken place on board another vessel. "The collision takes place at night, in darkness, and many important facts which bear on the collision taking place on board one ship are unknown on board the other. Thus, it cannot be known on board one ship what orders were given on board the other, what words passed, what look-out was kept, and so on."²¹ Moreover, "in proceedings of this kind it not infrequently happens that when the original statement is given in there are some points which are not clearly understood by the practitioners in the cause; hence it arises that the statement in the pleadings will occasionally be at variance with the evidence." In England such minor dis-

¹⁷ *M'Lean v. Johnstone*, 1906, 8 F. 836, Lord Justice-Clerk, at 838.

¹⁸ *Dent v. North British Railway Co.*, 1880, 17 S.L.R. 268, Lord Shand, at 269.

¹⁹ Bell, Comm. i., 579.

²⁰ *The "Iron Duke"*, 1845, 2 W. Rob. 377, Dr. Lushington, at 381.

²¹ *The "Schwalbe"*, 1859, Swa. 521, Dr. Lushington, at 523.

crepancies between pleadings and evidence do not necessarily detract from the reliability of a witness,²² and a very considerable elasticity has always been allowed in pleadings in collision actions,²³ in any event as regards happenings on the other vessel. In Scotland, however, where, owing to the absence of the preliminary Act and statement of claim, procedure is different, less latitude appears to be conceded, and it has been observed that, in any event as regards events on the party's own ship, the averments on record must be treated as the deliberate statement of the persons responsible for the navigation of the vessel, since "to admit the suggestion that they ought to be treated as an erroneous account, given by the professional advisers of the party, would be, in my opinion, to destroy the usefulness of a Scottish record in all cases of collision at sea."²⁴ As regards happenings on the other vessel, a clear case requires to be stated on record and properly supported by evidence.²⁵

Onus of Proof of Fault.—In accordance with the general rule, the onus of proof of fault rests on the party seeking to recover damages, but once a *prima facie* case has been established the onus is transferred to the defender. In the case of collision a *prima facie* case may be established by showing that the pursuer's vessel was at anchor at the time of the collision, while that of the defender was under weigh.¹ The onus will, however, be transferred back to the pursuer on proof that the vessel at anchor had neglected proper precautions, as by neglecting to keep a good look-out or lying improperly in the fairway.² Similarly, a presumption of fault is established by showing that a vessel is an overtaking one.³ Where one vessel has been lost with all hands and no evidence is therefore available from her, the case of the other vessel must be clearly and satisfactorily established.⁴ The statutory presumptions of fault which formerly arose on proof of infringement of any of the collision regulations, or on failure to stand by the vessel

²² *The "Traveller,"* 1843, 2 W. Rob. 197, Dr. Lushington, at 198.

²³ *The "Haswell,"* 1864, Br. & L. 247, Dr. Lushington, at 251.

²⁴ *Owners of s.s. "Thames" v. Owners of s.s. "Lutetia,"* 1884, 12 R. (H.L.) 1, Lord Watson, at 10.

²⁵ *Cambo Shipping Co., Ltd. v. Dampskibsselskabet Carl,* 1920 S.C. 26. See also *supra*, p. 38.

¹ *The "City of Peking,"* 1888, 14 A.C. 40, Lord Watson, at 43; *Mann, Macneal & Co. v. Ellerman Lines, Ltd.,* 1904, 7 F. 213; *The "Talisman" v. The "Tyne,"* 1897, 34 S.L.R. 360.

² *The "Industrie,"* 1871, 3 Adm. & Ec. 303.

³ *Owners of s.s. "Hilda" v. Owners of s.s. "Australia,"* 1884, 12 R. 76.

⁴ *The "Glasgow,"* 1914, 13 Asp. M.L.C. 33, Lord Loreburn, at 33.

with which the collision has taken place, have now been abolished.⁵ Where the plea of inevitable accident is taken in defence, the onus of proof nevertheless remains on the pursuer.⁶ In cross-actions the rule that the onus of proof rests on the party seeking to recover damages is obviously inapplicable, and there is then no onus. In such cases, if the parties fail to come to an agreement, the right to lead in evidence will generally be conceded to the party whose action is first raised. The onus of proof may be transferred by admission, as where, in order to save expense, one party admits that his vessel is partly to blame, in which case the onus lies on him to prove that the other party is also to blame.⁷ The onus of proof that a master has executed a wrong manœuvre rests on the party founding on it, and when evidence is conflicting and closely balanced, there is a presumption that he is a competent seaman and has adhered to the ordinary rules of navigation.⁸ A similar presumption appears to apply *e fortiori* to the case of a pilot in charge of the navigation of a ship within his own area.

Tender.—In collision actions, more particularly in the case of cross-actions, a tender is occasionally made in the form of an offer to settle on the footing that both vessels are to blame and under reservation of all rights and pleas competent to the tenderer and without any admission of liability. Although such tenders do not conform to the common law rule that tenders should be free of all qualifications and conditions,⁹ they have been judicially approved, and it has been observed that “the peculiar conditions which affect counter actions for collision at sea render the ordinary form of tender inapplicable to them.”¹⁰ The award of expenses also departs from the common law rules. At common law a tender should be accompanied by an offer of the expenses of the action. In cross-actions, however, for damage by collision a tender “is made on the footing (necessarily implied) that if both vessels are ultimately found equally to blame the usual rule of no expenses to either party will apply prior to its date; but if the tender is not accepted, and the conclusion arrived at

⁵ Maritime Conventions Act, 1911 (1 & 2 Geo. V. c. 57), sec. 4.

⁶ *The “Marpesia,”* 1872, 4 P.C. 212.

⁷ *The “General Gordon,”* 1890, 6 Asp. M.L.C. 533.

⁸ *The “Mary Stewart,”* 1844, 2 W. Rob. 244.

⁹ *Little v. Burns*, 1881, 9 R. 118.

¹⁰ *Owners of s.d. “Diligence” v. Owners of s.d. “Swift” et c contra*, 1921, 2 S.L.T. 145, Lord Ordinary, at 146; [a form is printed in the Appendix, p. 381.]

“by the Court is that both vessels are equally to blame, it is only fair that the party whose refusal has caused expenses to be incurred subsequent to the date of the tender should be found liable in such expenses.”¹¹ The rule applies *e fortiori* where it appears that the tenderer has sustained the greater amount of damage.¹² It applies also even in cases where the ultimate decree of the Court does not correspond exactly with the tender.¹³ At common law a mere extrajudicial offer to settle does not affect the question of expenses, and is not taken into consideration in awarding them. In cross-actions for collision, however, it may do so indirectly, and for this reason an offer to settle is a “critical matter,” for which the expenses of counsel for consideration may be allowed.¹⁴

Assessment of Damage.—Damage is usually assessed by the Court. Occasionally in cases of loss of life or personal injury it is assessed by a jury. In one such case where the verdict fell to be applied while other actions arising out of the same collision were in dependence and before it appeared whether a petition for limitation of liability would require to be presented by the shipowners, the verdict was applied at once, but extract of the decree was superseded *ad interim*.¹⁵

Measure of Damage : (1) In Claims for Damage to Persons.—Since claims for loss of life or personal injury are not determined by maritime law, the measure of damage is the same as in claims brought under the common law jurisdiction.¹⁶

(2) In Claims for Damage to Property.—Claims for damage to property are within the Admiralty jurisdiction of the Courts. The measure of damage, however, is the same as at common law, and is the same in Scotland as in England. Such has been expressly held to be the case in the case of damage for breach of affreightment, and the desirability of uniformity of practice emphasised, and the same principle appears to apply in damage by collision.¹⁷ Accordingly English decisions may be regarded as authoritative. Subject always to modification by the rule

¹¹ *Ibid.*

¹² *Tobiasen v. Isle of Man Steam Shipping Co.*, 1893, 1 S.L.T. 272.

¹³ *Little v. Burns*, 1881, 9 R. 118.

¹⁴ *Coppack v. Miller*, 1911, 2 S.L.T. 65.

¹⁵ *M'Lean v. Clan Line Steamers, Ltd.*, 1925 S.C. 256.

¹⁶ *Kendrick v. Burnett*, 1897, 25 R. 82.

¹⁷ *Stroma Bruks Aktie Bolag v. J. & P. Hutchison*, 1905, 7 F. (H.L.) 131, Lord Davey, at 136.

of division of loss where both ships are to blame, and to the limitation of the owner's liability in certain events, the common law principle of *restitutio in integrum* is applied to the measure of damage in collision cases, although in such cases the nature of the questions are necessarily different from those which arise at common law.¹⁸ It has been pointed out, however, that the principle of *restitutio in integrum* cannot be applied literally, and that its true meaning is payment of such a sum of money as will make good the loss so far as money can.¹⁹ In the case of damage by collision any loss flowing directly and in the usual course of events from the wrongful act is recoverable, including the cost of necessary repairs and of demurrage, for a reasonable period incurred in executing them.²⁰ A distinction, however, requires to be drawn between ships which are engaged in commerce and earning profits and those which are devoted to particularised uses, such as vessels belonging to public authorities and warships, which, in the ordinary course, earn nothing at all.

(a) **Vessels Engaged in Commerce.**—In the case of vessels engaged in commerce the only question for the Court is, "What is the use which the shipowner would but for the accident have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner but for the accident would have earned by the use of her."²¹ Damage may be either direct or consequential.

(1) **Direct Damage.**—The measure of the direct damage is the value of the vessel at the time of the collision, or, where she is capable of repair, the cost of repairs rendered necessary by the collision. Her proper value is her market value, but when a vessel under charter is totally lost, the measure of damage is her value at the time of the loss, together with a proper sum for freights or profits at the end of the voyages fixed by the existing charters subject to proper deductions for contingencies and ordinary wear and tear.²² In the absence of a market value, as where the vessel is of a special type, a fair value from a business point of view and not the cost

¹⁸ *The "Kingsway,"* 1918, P. (C.A.) 344, Pickford, L.J., at 356.

¹⁹ *Admiralty Commissioners v. Owners of s.s. "Valeria,"* 1922, 2 A.C. 242, Lord Dunedin, at 248.

²⁰ *The "Black Prince,"* 1862, Lush. 568.

²¹ *The "Argentino,"* 1888, 13 P.D. (C.A.) 191, Brown, L.J., at 201; approved, 1889, 14 A.C. 519.

²² *The "Philadelphia,"* 1917, P. (C.A.) 101.

of replacement should be taken.²³ This may be difficult to determine, and there is no general method of estimating it. The method of taking the cost of construction of a new vessel, subject to a deduction of 5 per cent. for depreciation for each year of the vessel's age, is useful as a corrective, but unsatisfactory where general market values are far below costs of construction. The appropriate evidence is that of witnesses familiar with the shipping market.²⁴

In the event of repairs being required, the sum recoverable is estimated by the cost of repairing the vessel at the nearest port to which she may reasonably proceed after the accident, and this rule has been applied in a case where a ship, after executing temporary repairs at a neighbouring port, proceeded to her home port for permanent repair.²⁵ On similar grounds, when one of His Majesty's ships proceeded to a Government dockyard for repairs where, owing to local conditions, the dock charges were higher than elsewhere, it has been held that the Admiralty Commissioners could only recover such a sum as it was the custom to pay elsewhere for similar accommodation.¹ The cost of repairs includes the fees paid for such survey of the ship as may be necessary, but the principle of surrogation operates to prevent the fees of separate surveyors for owners and underwriters being allowed.² If the repairs result in actual depreciation in the value of the vessel, as in the case of a yacht whose trim has been altered by the repairs, such depreciation will be allowed for.³ If the repairs have not been executed at the time of assessment, they may, nevertheless, be allowed for if it can be proved with reasonable certainty that they will be executed,⁴ but if it appears that they will never be executed, as where the ship has been lost, no allowance will be made for them.⁵

(2) *Consequential Damage*.—To enable an owner to recover for consequential loss “two things are absolutely necessary—“actual loss and reasonable proof of the amount.”⁶ The prin-

²³ *The “Harmonides,”* 1903, P. 1.

²⁴ *Laird Line, Ltd. v. Clan Line Steamers, Ltd., et c contra*, 22nd March, 1924 (not reported).

²⁵ *Beucken v. Aberdeen Steam Trawling and Fishing Co., Ltd.*, 1910 S.C. 655.

¹ *The Admiralty v. Aberdeen Steam Trawling and Fishing Co., Ltd.*, 1910, S.C. 553.

² *The “Molière,”* 1925, P. 27.

³ *Hamilton v. Galloway Steam Packet Co.*, 1894, 1 S.L.T. 432.

⁴ *The “Kingsway,”* 1918, P. (C.A.) 344.

⁵ *The “City of Peking,”* 1890, 15 A.C. 438.

⁶ *The “City of Peking,” supra*, at 442.

principal ground of claim is that for loss of employment or demurrage. In the case of a claim for demurrage for repair of a vessel under charter the measure of damage is not the amount of the actual out-of-pocket expenses, including the hire of a substitute vessel, to which the charterers are in fact put, but the amount of freight which but for the accident the ship would have earned during the period of detention, together with the estimated working expenses.⁷ The award may be given either in name of estimated earnings under the contract or in name of demurrage, since allowance for demurrage is merely a method of assessing damage for loss of employment.⁸ The value of the claim is generally difficult to estimate. In one case it was assessed by consent on the earnings of the ship on the voyage prior to and on that subsequent to the voyage on which the collision occurred.⁹ The principle has been extended to the case where the voyage in respect of which the claim is made has not been actually contracted for, but is a natural consequence of a voyage for which a contract has already been made in the expectation that substantial profits may be obtained on the return passage.¹⁰ Similarly, the estimated future profits of a fishing vessel may be allowed for.¹¹ Freight is understood in the sense of net freight, *i.e.*, the freight after deduction of what would ordinarily be disbursed for the ship's expenses in earning the freight.¹² It has been observed that the term "voyage" is not capable of definition, that its meaning is one of fact and depends on a variety of considerations, among which it is of importance "whether there has been a sailing from and afterwards a return to the "United Kingdom."¹³ This view conforms with the general practice of shipowners who treat a round voyage as a unit for purposes of accounting. In the case of estimated profits a distinction is drawn in England according as the vessel has been merely temporarily laid up for repairs or totally lost, possible future earnings in the latter case being regarded as too remote.¹⁴ In Scotland, however, no such distinction is drawn, it having been observed that there is "no reason in principle

⁷ *Admiralty Commissioners v. Owners of s.s. "Valeria,"* 1922, 2 A.C. 242.

⁸ *The "Argentino,"* 1888, 13 P.D. (C.A.) 191; 1889, 14 App.Cas. 519.

⁹ *"Vitruvia" S.S. Co., Ltd. v. Ropner Shipping Co., Ltd.,* 1923 S.C. 574.

¹⁰ *Parker v. North British Railway Co.,* 1900, 7 S.L.T. 304.

¹¹ *Main v. Leask,* 1910 S.C. 772.

¹² *The "Gazelle,"* 1844, 2 W. Rob. 279.

¹³ *The "Scarsdale,"* 1907 A.C. 373, Lord Loreburn, L.C., at 378.

¹⁴ *The "Anselma de Larrinaga,"* 1913, 29 T.L.R. 587.

“ for excluding a claim of damage for loss sustained by owners
 “ of the vessel in consequence of its being sunk at a particular
 “ date, provided only that such claims are not too extended in
 “ time or do not rest on mere probabilities as contrasted with
 “ reasonable certainty.”¹⁵ Questions of difficulty may arise where owners’ repairs are executed simultaneously with the collision repairs, but in their case also the sole question is what is the loss to the owner in consequence of the collision. If the owner has been compelled to carry out owner’s repairs in consequence of the collision sooner than he would otherwise have done, this fact may be allowed for, and also the fact that he has taken advantage of the occasion of the collision repairs to carry out owners’ repairs, the execution of which would, in any event, have deprived him of the use of his vessel at an early date.¹⁶ Under claims for consequential loss allowance may also be made for the expense of salvaging¹⁷; or of towing¹⁸ a damaged vessel; for payments made to a third vessel damaged by the collision¹⁹; for loss of profit due to the cancellation of a charter party²⁰; for delay in repairs due to strikes²¹; and for payments made in name of compensation for loss of life under the Workmen’s Compensation Acts.²² A claim, however, for damage for loss of market is too remote.²³

Where loss by demurrage is proved in foreign currency the proper date for determining the rate of exchange for conversion of the award into British currency is the date at which the detention commenced.^{23a}

(b) **Specialised Vessels.**—In the case of vessels which are entirely devoted to specialised uses which prevent them engaging in trade special considerations apply, but the fact that they do not earn profits does not render the damage incapable of measurement. Thus, harbour authorities who draw their funds from the rates and do not distribute profits are nevertheless entitled to damages for capital loss due to damage to a

¹⁵ *Main v. Leask*, *supra*, Lord Ardwall, at 780.

¹⁶ *The “Chekiang,”* 1925, P. (C.A.) 80.

¹⁷ *The “Linda,”* 1857, Swa. 306.

¹⁸ *H.M.S. “Inflexible,”* 1857, Swa. 200.

¹⁹ *The “Frankland,”* 1901, P. 161.

²⁰ *The “Star of India,”* 1876, 1 P.D. 466.

²¹ *H.M.S. “London,”* 1914, P. 72.

²² *The “Annie,”* 1909, P. 176.

²³ *The “Notting Hill,”* 1884, 9 P.D. (C.A.) 105.

^{23a} *Owners of s.s. “Celia” v. Owners of s.s. “Vulturino,”* 1921, 2 A.C. 544.

dredger.²⁴ Similarly, where a lightship is damaged and replaced by another, the harbour authorities are entitled to damages for loss of the services of the ship in addition to any out-of-pocket expenses incurred.²⁵ A similar rule is applied in the case of a warship.¹ Again, where a dredger which was maintained out of the rates and was earning nothing had been disabled, it was held that the loss included the value of the work which she might have done but for the accident and a sum for the cost of the daily supplies needed for her when at work, but nothing in name of owner's profits, since the expense of hiring a substitute had not in fact been incurred.² It has been pointed out that, although these cases are special in respect that in the ordinary course the vessels would earn nothing at all, the decisions are nevertheless consistent with the general principle laid down in the case of *The "Argentino,"* that the measure to be applied is "what is the use which the "shipowner would, but for the accident, have had of his ship "and what . . . the shipowner, but for the accident, "would have earned by the use of her."³

Onus of Proof of Damage.—The onus of proof that the damage is due to the fault of the defender's vessel rests on the pursuer, and the *dicta* in *The "Mellona,"*⁴ *The "Pensher,"*⁵ and other cases that, where damage follows a collision, there is a presumption that it is a consequence of the collision, do not lay down any general principle, but refer merely to the particular circumstances of these cases.^{5a}

Interest on Sum awarded as Damage.—In allowing interest on the sum awarded in name of damage, the practice of the Scottish Courts differs to some extent from that followed in England. In general the common law rules are applied, and it has been observed that, however desirable it may be that the practice in the two countries should be the same, English practice will not be adopted without clear evidence of the existence and extent of the practice.⁶

²⁴ *The "Greta Holme,"* 1897 A.C. 596.

²⁵ *The "Mediana,"* 1900 A.C. 113.

¹ *The "Astrakhan,"* 1910, P. 172.

² *The "Marpessa,"* 1907 A.C. 241.

³ *Admiralty Commissioners v. Owners of s.s. "Valeria,"* 1922, 2 A.C. 242, Lord Buckmaster, at 246. Cf. *The "Susquehanna,"* 1925, P. (C.A.) 196.

⁴ 1847, 3 W. Rob. 7, Dr. Lushington, at 13.

⁵ 1857, Swa. 211.

^{5a} *The "Paludina,"* 1925, P. (C.A.) 40.

⁶ *"Vitruvia" S.S. Co., Ltd. v. Ropner Shipping Co., Ltd.,* 1923 S.C. 574, Lord Skerrington, at 586.

(a) **In Direct Damage.**—In England in order to give full effect to the principle of *restitutio in integrum* the practice is as follows:—Interest runs, in the case of total loss, from the date of the loss; and in the case of repairs being effected, from the date at which the account for repairs is settled. On subsidiary awards, such as those for loss of effects of the crew, interest runs from the same date as the principal award. On awards for loss of or damage to cargo interest runs from the date at which it may be assumed that it would have been received at the end of the voyage.⁷ In Scotland it is an unusual, but not an incompetent, practice to allow interest on an illiquid claim of damages from a date earlier than the application of the decree, but it is recognised in proceedings for limitation of liability, and it has been observed that a sum which represents part of the capital value of a ship which has been totally lost is in a special position.⁸ In total loss interest is generally allowed from the date of the loss. The rule, however, may be modified on special grounds. Thus, in a case where a ship had been damaged in a collision immediately preceding that in which she was lost, and it was estimated that the repair of the damage, if it could have been executed, would have deprived the owners of the use of their ship for a period of three months, it was held that the interest on the sum awarded for the total loss should only begin to run from a date three months after the date of the loss, since, in any event, the owners would have been deprived of the use of their ship for that period.⁹ In the case of repairs being effected, it has been held that a claim for repairs, where neither the extent of the repairs necessary nor liability for them is disputed, approximates to a liquid debt, and, accordingly, that the claimant is entitled to interest from the date when the repairs were paid for.¹⁰ To this extent, therefore, the Scottish practice is similar to that of England.

(b) **In Consequential Damage.**—In consequential damage the common law practice appears to be adhered to. Thus, it has been held that a claim for damage for detention for repairs,

⁷ *The "Northumbria,"* 1869, 3 Adm. & Ec. 6; *The "Gertrude," The "Baron Aberdare,"* 1888, 13 P.D. (C.A.) 105; Roscoe's Admiralty Practice, 396.

⁸ *"Vitruvia" S.S. Co., Ltd. v. Ropner Shipping Co., Ltd.,* 1923 S.C. 574, Lord Skerrington, 587; cf. *Denholm v. London and Edinburgh Shipping Co.,* 1865, 3 M. 815.

⁹ *Laird Line, Ltd. v. Clan Line Steamers, Ltd.,* 22nd March, 1924 (not reported).

¹⁰ *"Vitruvia" S.S. Co., Ltd. v. Ropner Shipping Co., Ltd.,* 1923 S.C. 574.

being an illiquid claim, interest runs only from the date of the decree.¹¹

Forum non conveniens.—The general principles applicable to a plea of *forum non conveniens* in a maritime cause are considered elsewhere.¹² In the case of damage by collision it has been observed that the jurisdiction within which a collision has occurred and the bulk of the evidence is to be found will in general provide a convenient forum for the trial of a collision action, even if both parties to the case are resident elsewhere.¹³ This is more particularly the case if proceedings are taken against the wrongdoing vessel herself. In general the *locus* of the collision is disregarded and jurisdiction is exercised, provided that the wrongdoing ship has been validly arrested within the jurisdiction. Thus, jurisdiction has been exercised in an action against a foreign ship, although the collision had occurred within foreign territorial waters,¹⁴ and in the case of a collision between two foreign ships in Scottish territorial waters.¹⁵ Similarly, jurisdiction has been exercised in England in an action by the owner of a foreign against a British vessel, although the collision had occurred in foreign territorial waters,¹⁶ and in an action between the owners of two foreign vessels in the case of a collision in foreign territorial waters.¹⁷ The plea of *forum non conveniens* has, however, been sustained in an action laid alternatively for damage by breach of contract or for damage by collision against the owner of a foreign vessel in a case where the collision had occurred in foreign territorial waters, the question of liability involving the construction of a foreign contract to be partially carried out abroad and questions of foreign law.¹⁸ Where the ground of jurisdiction is not the arrestment of the wrongdoing ship herself, but merely the arrestment *ad fundandam jurisdictionem* of another vessel or other property belonging to the same owner, the reasons for exercising jurisdiction in the case of collision occurring abroad are obviously less strong, since the remedy *in rem* against the wrongdoing vessel is then excluded. By statute British Courts are entitled to exercise jurisdiction

¹¹ "*Vitruvia*" S.S. Co., Ltd. v. *Ropner Shipping Co., Ltd.*, 1923 S.C. 574.

¹² *Supra*, p. 41.

¹³ *Gibson v. Smith*, 1849, 11 D. 1024.

¹⁴ *Owners of s.s. "Reresby" v. Owners of s.s. "Cobetas"*, 1923 S.L.T. 719.

¹⁵ *Andersen v. Harboe*, 1871, 10 M. 217.

¹⁶ *The "Halley"*, 1868, 2 P.C. 193.

¹⁷ *The "Courier"*, 1862, Lush. 539.

¹⁸ *Hine v. MacDowall*, 1897, 5 S.L.T. 12.

“ whenever any injury has in any part of the world been caused
 “ to any property belonging to His Majesty or His Majesty’s
 “ subjects by any foreign ship,” and the ship is thereafter
 found in British territorial waters.¹⁹

Lis alibi pendens.—It is probable that the following decisions will be followed in Scotland:—The plea of *lis alibi pendens* in a foreign Court will not be sustained in an action in this country for damage by collision, provided that both actions are *in personam* and the proceedings in this country are in good faith. If, however, the action in the foreign Court is *in rem*, the plea will be sustained, provided always that the ship itself is within the lawful control of the foreign State and adequate security has been given in the foreign Court, and the proceedings in this country are against good faith.²⁰ If the action in this country is *in rem* and the foreign action *in personam* the plea will be repelled.²¹ A valid foreign judgment *in rem* is conclusive against the whole world.²²

Law to be Applied: (a) In Claims for Damage to Persons.

—In such claims the common law rules are followed. In Scots law in claims based on delict liability is determined by the *lex loci delicti*, and where, as on the high seas, there is no *lex loci delicti*, it is determined by the *lex domicilii* of the wrongdoer, provided always that the *lex domicilii* of the person injured concurs in providing a corresponding remedy.²³ In the application of this rule to delict committed at sea it has been pointed out that the *lex domicilii* of the injured person is assumed to be that of the flag of the ship in which he is carried, and not his personal law of domicile, and the rule appears to be similar with regard to the *lex domicilii* of the wrongdoer.²⁴

(b) In Claims for Damage to Property.—In such claims the maritime law is applied, and liability is determined by the *lex fori*. Claims for damage to property by collision are *communis juris*, and in applying the *lex fori* the Court is merely applying the law which is common to all nations as it is administered in

¹⁹ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 688.

²⁰ *The “Christienborg,”* 1885, 10 P.D. 141; cf. *The “Reinbeck,”* 1889, 6 Asp. M.L.C. 366; *The “Mannheim,”* 1897, P. 13; *The “Hagen,”* 1908, P. 189.

²¹ *The “Bold Buccleuch,”* 1851, 7 Moo. P.C.C. 267.

²² *Castrique v. Imrie*, 1870, 4 H.L. 414.

²³ *Kendrick v. Burnett*, 1897, 25 R. 82.

²⁴ *Convery v. Lanarkshire Tramways Co.*, 1905, 8 F. 117, Lord President, at 120.

this country.²⁵ Thus the *lex fori* is applied in collisions occurring either on the high seas or in foreign territorial waters, even if both vessels are foreign, since the jurisdiction of a State in its territorial waters "does not exclude the jurisdiction of the "Admiralty Courts of other nations to administer the laws of "their own forum in cases of collision between ships using the "territorial waters of the State for the purpose of passage, even "if one of these ships is the property of the littoral State," and if the collision is in foreign territorial waters it is probably immaterial that one of the vessels is the property of the littoral State. The question has, however, been raised whether the *lex fori* should be applied in the case of a collision occurring *intra fauces terræ* of a foreign State where the common law of the country presumably prevails.¹ Certain other limitations of the application of the *lex fori* are recognised. Thus, if the collision occurs in the territorial waters of a country where the owner is not liable for the wrongful acts of the master and crew, he will not be held to be liable for them in this country, since the question whether a particular individual is liable for an act which is wrong by the law of the place where it is committed depends on the substantive law of the place where the act is done.² Similarly, a person is not liable in this country for a collision in a foreign country unless the negligence is that of a person for whom he is responsible by the law of this country.³ In any event, questions regarding procedure or the form of the remedy are determined by the *lex fori*.⁴ Thus the order of ranking of claims, and all questions regarding maritime liens, are determined by the *lex fori*.⁵

Expenses.—In collision claims the general principles applied in awarding expenses are the same as in other causes, *i.e.*, expenses follow the event, and the successful party recovers his entire expenses from the other. Their application is, however, different, owing to the rule of division of loss where both vessels are found to blame and the fact that liability is generally determined in cross-actions. For this reason, a case of divided success in a collision action differs from a case of

²⁵ *The "Leon,"* 1881, 6 P.D. 148.

¹ *Owners of s.s. "Reresby" v. Owners of s.s. "Cobetas,"* 1923 S.L.T. 719, Lord Ordinary, at 721.

² *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*, 1883, 10 Q.B.D. 521, Brett, M.R., at 536.

³ *The "M. Moxham,"* 1876, 1 P.D. (C.A.) 107, Mellish, L.J., at 111.

⁴ *Kendrick v. Burnett*, 1897, 25 R. 82.

⁵ *The "Union,"* 1860, Lush. 128.

partial success at common law, and the general rule is that no expenses are found due to or by either party.⁶ A similar principle has been applied in the case of divided success in an action by a cargo owner, since he has failed as to part of his contention.⁷ The rule of no expenses due to or by either party is generally followed whether the loss is divided equally or in proportion to the degree in which each vessel is found to blame.⁸ If, however, a party has offered to settle extra-judicially on the footing of both to blame, and on the case proceeding to trial his offer is confirmed by the judgment of the Court, he has been held entitled in Scotland to expenses on the ground of partial success, and a similar result has been reached in England on the ground that he has succeeded on the only point which is in issue,⁹ but if he has failed to make such an offer, and both parties are in the event held to blame, the case is different from one of partial success, and no expenses are due to or by either party. Thus, where a case was sent to jury trial on the issue whether the pursuer's ship was lost by the fault of the defender and damages were laid at the full value of the ship, and the jury found in fact that the loss was occasioned by both ships equally, it was held that, although this was in fact a verdict for the pursuer, the case was not one of partial success for the purpose of expenses, since by claiming the full value of the ship the pursuer had compelled the defender to go to trial, and, accordingly, that he could not recover expenses.¹⁰ Similarly, in the case of cross-actions when an offer to settle is made on the footing of both to blame and is refused, and in the event the offer is confirmed by the judgment of the Court, the tenderer has been awarded expenses from the date of the offer on the ground that its refusal has rendered the subsequent litigation necessary.¹¹ The rule applies *a fortiori* when the tenderer has sustained the greater amount of damage.¹² Where neither vessel is found to blame and both parties have litigated voluntarily, it has been held that no expenses are due to or by either party,

⁶ The "*Hector*," 1883, 8 P.D. (C.A.) 218.

⁷ The "*City of Manchester*," 1880, 5 P.D. 221.

⁸ The "*Rosalie*," 1912, P. 109; *Crown S.S. Co., Ltd. v. Eastern Steam Navigation Co., Ltd.*, 1918 S.C. 303.

⁹ The "*General Gordon*," 1890, 6 Asp. M.L.C. 533.

¹⁰ *Clyde Shipping Co. v. Glasgow and Londonderry Steam Packet Co.*, 1859, 21 D. 898, 1131.

¹¹ *Owners of s.d. "Diligence" v. Owners of s.d. "Swift" et contra*, 1921, 2 S.L.T. 145.

¹² *Tobiasen v. Isle of Man Steam Shipping Co.*, 1893, 1 S.L.T. 272.

but if it is clear that there would have been no litigation unless one party had made a claim, that party will be liable for the entire expenses.¹³ In the case of a plea of inevitable accident being upheld formerly no expenses were found due to or by either party.¹⁴ The practice, however, now is for expenses to follow the event.¹⁵ An award of expenses may be modified by the principle that ships have identities separate from that of their owners. Thus, when an owner of two vessels makes a claim in respect of them both, and is only successful in respect of one, it has been held that he is only entitled to half the expenses incurred. For such purposes identity of ownership on the register is immaterial, true ownership being alone considered. Although the rule has hitherto only been applied in the case of salvage, it appears to be equally applicable to claims for damage by collision were such an occasion to arise.¹⁶ The rule that no expenses are due to or by either party in the event of divided success is not necessarily followed in an Appeal Court. Thus, when a plaintiff's vessel has been found solely to blame, in the trial Court, and he has successfully appealed on the ground that the defendant's vessel is also to blame, he may be allowed the expenses of the appeal.¹⁷ When it has been held in the trial Court that both are to blame and the Court of Appeal holds that neither are to blame, no expenses have been allowed to or by either party.¹⁸

¹³ *The "Cardiff Hall,"* 1918, P. 56.

¹⁴ *The "Marpesia,"* 1872, 4 P.C. 212.

¹⁵ *The "Monkseaton,"* 1889, 14 P.D. 51.

¹⁶ *Grangemouth and Forth Towing Co., Ltd. v. s.s. "River Clyde" Co., Ltd.,* 1908, 16 S.L.T. 638.

¹⁷ *The "London,"* 1905, P. (C.A.) 152, following *The "Ceto,"* 1889, 14 A.C. 670.

¹⁸ *The "Utopia,"* 1893 A.C. 492.

CHAPTER V.

AFFREIGHTMENT.

Jurisdiction.—In Scotland the nature of the jurisdiction in affreightment differs from that in England. In England, with the exception of a special statutory jurisdiction in the case of vessels none of whose owners are domiciled in England or Wales,¹ there is no jurisdiction in Admiralty, and claims require to be brought in common law form. In Scotland, however, the Courts have an Admiralty jurisdiction in all claims arising from affreightment under which proceedings *in rem* may be taken.²

Nature of Affreightment.—In Scotland affreightment is a real contract of deposit on which a consensual contract of hire has been superimposed. It “is an agreement to carry goods delivered. It belongs to a category of contracts well known in the law, those contracts, namely, which are not completed by consent or by words or writ but *re* by the actual intervention of things. . . . The contract of affreightment is of the nature of deposit. Certain articles are deposited to be dealt with in a certain manner. There is this difference between our law and the civil law, that, while by the latter contracts of deposit and mandate are purely gratuitous, that is not necessarily the case in our law. To complete the modern contract of affreightment there is engrafted on the contract of deposit a certain *locatio operarum*. The depositary is not simply to keep the goods entrusted to him, but he is to take them to a given destination in a ship.”³ As depositaries, therefore, the shipowner and the master as his representative are subject to the obligations imposed by the edict *nautæ caupones stabularii*. Although the contract is one of maritime law, and, therefore, *juris gentium*, the general principles of construction to be followed are the same as in land carriage, and in order to import different rules from maritime law “there must be the

¹ Administration of Justice Act, 1920 (10 & 11 Geo. V. c. 8), sec. 5.

² See *supra*, p. 2.

³ *M'Lean & Hope v. Munck*, 1867, 5 M. 893, Lord Neaves, at 902.

"general consent of the maritime nations of the world expressed in the prevailing practice and understanding of the traders of these nations."⁴ It has been observed that it is a "contract to which the principles of equity are pre-eminently applicable."⁵ The contract does not require any formal writing, and the ancient statutes by which the execution of a charter party was obligatory are now in abeyance.⁶ It may be one either of special or of general affreightment.

Special Affreightment.—In special affreightment a special agreement is made by the shipowner or by the master on his behalf with the freighter by which the ship or a portion of it is hired for a voyage or series of voyages or on time, and she is known as a chartered ship.⁷ In such cases the common law obligations of the parties are generally varied by express stipulations embodied in a charter party or bill of lading. The common law liability of the shipowner may be qualified, varied, or excluded, and the contract may become purely consensual, and will be construed in accordance with the ordinary rules of contract. By the Carriage of Goods by Sea Act, 1924,⁸ however, freedom of contract has now been to some extent restricted in contracts governed by bills of lading. Sub-contracts of carriage made by the charterer with third parties, so long as the owner remains in legal possession of the ship, are not properly contracts of affreightment, but merely innominate contracts.⁹ A charter party by which the owner parts with the entire possession and control of the ship to the charterer is known as a charter of demise. The charterer then acquires all the rights and liabilities of the owner towards third parties, and may enter contracts of carriage with them which are proper contracts of affreightment.¹⁰ A charter of demise, however, is not a charter party in the ordinary sense. The main test whether an instrument is a charter party proper or a charter of demise is whether it is the intention of the parties that the master should be the servant of the owner or of the charterer.¹¹

⁴ *Watson & Co. v. Shankland*, 1871, 10 M. 142, Lord President, at 152; affirmed 1873, 11 M. (H.L.) 51.

⁵ *Hillstrom v. Gibson & Clark*, 1870, 8 M. 463, Lord Ardmillan, at 472.

⁶ *Rederi Aktiebolaget Nordstjernan v. Salvesen & Co.*, 1903, 6 F. 64.

⁷ Bell, Comm. i., 528; Prin., sec. 405.

⁸ 14 & 15 Geo. V. c. 22.

⁹ *Youle v. Cochrane*, 1868, 6 M. 427, Lord President, at 431.

¹⁰ Bell, Prin., sec. 405.

¹¹ *Page v. Admiralty Commissioners*, 1921, 1 A.C. 137.

General Affreightment.—In general affreightment the conditions of the contract are implied by law, and no special obligations are incurred by either party except in so far as they are contained in the sailing bills or other public notice by which the ship is advertised as available for the use of all persons who have goods to send to its port of destination or in so far as bills of lading are issued. In the coasting trade bills of lading are seldom issued, and the contract is formed merely by the offer contained in the sailing bill and by the acceptance implied in the fact of goods being placed on board.¹² By the Carriage of Goods by Sea Act, 1924,¹³ in the coasting trade special agreements may now be made in any terms, which may be embodied in receipts which are declared to be non-negotiable. In the overseas trade, however, bills of lading are generally issued by which special conditions are frequently imported into the contract. In general affreightment the ship is known as a general ship. The owner of a general ship is in the position of a common carrier,¹⁴ and therefore of a depositary, and his liability "is formed by the law itself; for the bare act "of receiving goods lays him under it without covenant."¹⁵ In England it has been held that the owner of a general ship is not a common carrier where he carries goods under a bill of lading, even in questions outwith the scope of the bill of lading.¹⁶ Whether the owner of a ship which is not a general ship but carries goods for hire incurs the liability of a common carrier is as yet undecided.¹⁷ The owner of a general ship is relieved of the obligation which he would otherwise incur of inquiring into the title of persons who offer goods for shipment,¹⁸ and, accordingly, a contract of general affreightment may exist for the carriage of stolen goods unless the owner or master of the ship is in fact aware that the goods are stolen.¹⁹

Affreightment of Passengers.—A contract of affreightment may also be entered into for the carriage of persons, and in this case is regulated by the same general principles as in the case of the carriage of goods.²⁰ The main distinction is

¹² *Wood & Co. v. G. & J. Burns*, 1893, 20 R. 602, Lord Trayner, at 614; Bell, Comm. i., 540.

¹³ 14 & 15 Geo. V. c. 22, sec. 4, art. vi.

¹⁴ Bell, Prin., sec. 411; *Wood v. G. & J. Burns*, *supra*, Lord Young, at 609.

¹⁵ Erskine, Inst., 3, 1, 28.

¹⁶ *Nugent v. Smith*, 1876, 1 C.P.D. 19; (C.A.) 423.

¹⁷ Cf. *Liver Alkali Co. v. Johnson*, 1874, 9 Ex. 338.

¹⁸ Bell, Comm. ii., 99.

¹⁹ *The "Mosgiel" S.S. Co. v. Stewart*, 1900, 16 Sh.Ct.Rep. 289.

²⁰ Bell, Prin., sec. 405.

that in this case the edict does not apply, and that a higher standard of care is required for the preservation of life than of property. Certain statutory provisions are made for the safety of passengers.²¹ The common law obligations of the shipowner are usually varied by the issue of contract tickets. In the case of steerage passengers in any ship and of cabin passengers in any emigrant ship these require to be in special form approved by the Board of Trade.²² It has been pointed out that actions for damages by passengers are usually founded on negligence arising from neglect of a duty which may be imposed by contract or by operation of law, and that both these elements are usually present and overlap, and that any exception to the carrier's duty must rest on contract.²³

Negligence.—At common law the shipowner incurs an absolute obligation to deliver the cargo safely except in the event of damage or loss being occasioned by act of God, the King's enemies, or perils of the sea. To these excepted causes of liability he may add others by which he may free himself from liability for the negligence of other persons, including that of his servants,²⁴ but not from his own, and, accordingly, he may incur liability for his own negligence even in cases where the damage or loss arose from one of the causes expressly excepted, provided that the cause came into operation from his own negligence, since from the common law obligations which are imposed on him "it seems to follow as a necessary consequence that even in cases within the very terms of the exceptions in the bill of lading the shipowner is not protected if any default or negligence on his part has caused or contributed to the loss."²⁵ Liability for negligence, however, rests in him not in his capacity of carrier, but in that of depositary. Accordingly, an exception in a bill of lading may be sufficient to discharge him from liability as a carrier and yet leave him under his common law liability as depositary. In such a case the onus of proof of negligence rests on the owner of the cargo, as it does on the owner of goods in all cases of deposit. If, however, the shipowner expressly founds on an exception in the bill of lading as the cause of the damage or loss, the onus

²¹ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), secs. 267-268; Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), secs. 13-24.

²² Merchant Shipping Act, 1894, *supra*, sec. 320.

²³ *Hood v. Anchor Line, Ltd.*, 1918 S.C. (H.L.) 143, Lord Dunedin, at 148.

²⁴ *Hood v. Anchor Line, Ltd.*, *supra*.

²⁵ *The "Xantho"*, 1887, 12 A.C. 503, Lord Macnaghten, at 515.

of proof rests on him.¹ The master and crew are liable for their own negligence.² Their liability, however, is confined to the case of goods which have been actually shipped, since otherwise the goods are not under their control.³ It is uncertain how far the master is personally liable to the cargo owner for the negligence of the crew,⁴ but he is not personally liable to the shipowner for such negligence.⁵

Procedure.—In practice actions of affreightment are usually brought *in personam*. Since, however, such actions were within the jurisdiction of the Scottish Court of Admiralty, there appears to be no reason in principle why proceedings *in rem* should not be taken. Bell is of opinion that procedure *in rem* is competent, although he admits that there is no precedent in Scotland for its exercise, and also that a maritime lien exists over the vessel.⁶ He states that “there are two situations which require and afford real security to the owners of goods. One is, where the goods are on board in execution of a charter party, and the voyage is interrupted on the part of the master or owner of the ship, or of the creditors; another is, where the goods have been sold, lost, or injured during the voyage. In these cases, recourse upon the property of the vessel, in guaranty of the personal obligation to indemnify, is sanctioned by the general law of mercantile States.” After pointing out that the position in England is different owing to the absence there of an original Admiralty jurisdiction, he continues—“In Scotland there is no such obstruction to the operation of the general principle, though there is no authority or precedent establishing it as admitted with us . . . but there seems to be no reason to deny the privilege which the maritime law gives for all losses and injuries done to the cargo; and probably in our Court of Admiralty remedy would accordingly be given.”⁷ It is possible that such a right might be exercised where the goods are actually shipped aboard the *res* and carried under bills of lading. Otherwise it appears to be necessary to proceed *in personam* against the

¹ *Moes, Molière & Tromp v. Leith and Amsterdam Steam Shipping Co.*, 1867, 5 M. 988, Lord President, at 992.

² *Napier v. Leith*, 1859, 21 D. 551.

³ *M'Lean & Hope v. Munck*, 1867, 5 M. 593.

⁴ See Marsden's *Collisions at Sea*, 8th edn., 73.

⁵ *Petrie's Executor v. Aitchison & Co.*, F.C. 6th February, 1841.

⁶ Prin., sec. 1399.

⁷ Comm. ii., 39.

shipowner.⁸ The right of proceeding *in rem* may be of considerable value in the case of foreign vessels whose owners are unknown or outwith the jurisdiction, or in cases where it is uncertain whether the vessel has been demised or not. Moreover, owing to the existence of the shipowner's lien on cargo aboard the ship for freight, the power of proceeding against the actual vessel in which the cargo has been shipped may be of value. In England a special jurisdiction *in rem* in the case of vessels none of whose owners are domiciled in England or Wales was found convenient, and has now been created by statute.⁹

Conjunction of Actions.—In appropriate circumstances actions of affreightment may be conjoined. Thus, separate actions against the owners and against the charterers of a ship have been conjoined and sent to jury trial, notwithstanding that the averments in the second action were contradictory to and destructive of the averments in the first.¹⁰ Actions of affreightment are, however, no longer regarded as appropriate for jury trial. Similarly, in cases where a charter party has been made by the master on behalf of the owner, it is competent to sue them jointly and severally.¹¹ Similarly, a single action may be brought to enforce separate claims for demurrage arising from delay in taking delivery of cargo on separate occasions on different voyages in respect of the same ship. In such a case, however, a tender may be made in respect of each claim separately, and it is not necessary before doing so to offer payment of the expenses of the whole action, since the Court discourages duplication of actions, and it would be inequitable to penalise the defender owing to the fact that a single action has been brought.¹² The contract may give rise to counter claims which may be heard in cross-actions, as where the shipowner sues for freight and the freighter brings a cross-action for damage to cargo.¹³

Limitation of Actions.—In cases to which the Carriage of Goods by Sea Act, 1924, applies, no liability is incurred either by the carrier or the ship "unless the suit is brought

⁸ Cf. *Ship "Marlborough Hill" v. Alex. Cowan & Sons, Ltd.*, 1921, 1 A.C. 444, Lord Phillimore, at 455.

⁹ Administration of Justice Act, 1920 (10 & 11 Geo. V. c. 8), sec. 5.

¹⁰ *London and Caledonian Marine Insurance Co. v. London and Edinburgh Shipping Co., and Dundee, Perth, and London Shipping Co.*, 1867, 5 M. 982.

¹¹ *Begg v. Rhind*, 1850, 13 D. 185.

¹² *Hamilton & Co. v. John Fleming & Co., Ltd.*, 1918, 1 S.L.T. 229.

¹³ *Williams v. Dobbie et contra*, 1884, 11 R. 982.

“ within one year after delivery of the goods or the date when
“ the goods should have been delivered.”¹⁴

Title of Shipowner to Sue for Damage to Cargo.—In cases where the ship and cargo have received damage at the hands of a third party, as in the event of collision with another vessel, the question whether or not the shipowner has a title to sue not only for the damage sustained by his ship but also for that sustained by the cargo, may be of importance, more particularly in the case of a general ship carrying a great variety of cargo belonging to a great number of different owners where no bills of lading have been issued. In such cases the inconvenience and expense caused to all parties by the necessity of raising a great number of separate actions may be very considerable. Where the shipowner is responsible to the owners of the cargo for its value, it is probable that he is entitled to sue on their behalf, since he then incurs liability for the total amount of damage. Thus, in the case of salvage it has been held that an action may competently be brought against the owner of the salvaged ship for services rendered to the cargo as well as to the ship in cases where the shipowner is responsible to the owners of the cargo for its value,¹⁵ and the converse appears also to hold in actions by the shipowner on behalf of the cargo owner. In cases, however, where the shipowner is not responsible to the owners of the cargo for damage sustained by it there is an absence of authority, and it is not clear whether the shipowner's position as depositary of the cargo is sufficient to confer on him a title to sue on behalf of the cargo owners. In England, on the law of bailment, it has been held that possession of the cargo confers a right on the shipowner to sue wrongdoers.¹⁶ In such circumstances the shipowner may recover the full amount of the damage sustained by the cargo, even in cases where the cargo owners have refused to concur in the action. Where, however, the fund available in payment is limited, such right of action confers no priority of claim on the shipowner, and he ranks rateably on the fund with the cargo owners, and must account to all for the sum recovered.¹⁷ It is possible that the principle of these decisions will be followed in Scotland.

¹⁴ 14 & 15 Geo. V. c. 22, Schedule, art. iii.

¹⁵ *Duncan v. Dundee, Perth, and London Shipping Co.*, 1878, 5 R. 742.

¹⁶ *The "Winkfield"*, 1902, P. (C.A.) 42.

¹⁷ *The "Johannis Vatis"*, 1922, P. (C.A.) 92.

Maritime Lien.—As already observed, the existence of a maritime lien in favour of the freighter is uncertain. It may be noted, however, that in this case the absence of a lien in England does not necessarily preclude its existence in Scotland. In England there is no original jurisdiction in Admiralty in affreightment, and in England, therefore, no such lien can arise unless expressly created by statute. It has been pointed out, moreover, that the principle that Admiralty law should be the same both in Scotland and in England is confined to cases “which exclusively belong to the jurisdiction of the Admiralty Courts in both countries,” and, therefore, does not apply in cases where, as here, the Admiralty jurisdictions do not coincide.¹⁸ There is, however, in Scotland no instance of the lien having been exercised.¹⁹

Possessory Lien for Freight.—Both in special and in general affreightment the shipowner and the master on his behalf have a possessory lien over the cargo for freight.²⁰ Being based on deposit and derived from the *actio contraria* of Roman law, it may be exercised altogether independently of the existence of a contract of affreightment between the shipowner and the freighter, provided only that the cargo is in the shipowner's possession. Thus, it may be exercised by the owners of a ship employed under charter party over cargo placed on board by a sub-freighter under an innominate agreement with the charterer,²¹ or against shippers on bills of lading granted by the charterers, although the shipowners have no direct action against them for the freight.²² The opinion has been expressed that it covers expenses necessarily incurred in preserving the cargo.²³ It may be waived or discharged either expressly or tacitly.²⁴ By the Merchant Shipping Act, 1894, it is provided that the lien is not discharged by reason of the cargo being landed and warehoused,²⁵ and in certain events the shipowner may exercise the power of sale. There is no lien for a general balance of account, but delivery of each instalment of cargo may be withheld until the freight on it

¹⁸ *The Ship “Blairmore” Co., Ltd. v. Macredie*, 1898, 25 R. (H.L.) 57, Lord Watson, at 63.

¹⁹ Bell, Prin., sec. 1399.

²⁰ Bell, Comm. ii., 99.

²¹ *Youle v. Cochrane*, 1868, 6 M. 427, Lord President, at 431.

²² *Mitchell v. Burn*, 1874, 1 R. 900.

²³ *Cargo ex “Argos,”* 1873, 4 Adm. & Ec. 13.

²⁴ Bell, Comm. ii., 96.

²⁵ Secs. 492-501.

is paid.²⁶ The lien may be lost by payment of the freight, by delivery of the cargo, or by abandonment of the ship.²⁷ There is no lien for dead freight, advance freight, or freight payable after delivery, unless they have been expressly created by contract. Dead freight is not properly freight, but "unliquidated compensation for loss of freight."²⁸ An agreement to pay advance freight may be an illegal preference under the Act 1696, c. 5.¹ Liens may, however, be created by express agreement, and are frequently so created for dead freight and for demurrage.²

Measure of Damage.—In Scotland the measure of damage is the same as in England, being the same as in other forms of contract, and it has been pointed out that in affreightment it is of great importance that there should be uniformity of practice between the two countries. Special damages cannot be claimed unless they were within the contemplation of both parties at the time of the contract, and it has been observed that the distinction between general and special damage is more appropriate to cases arising from delict than to those arising from contract.³

Limitation of Liability of Shipowner.—The liability of the shipowner is limited by certain statutory exemptions and limitations. Thus, it is a penal offence to attempt to send dangerous goods by sea under a false description.⁴ The master or owner of any British or foreign vessel may refuse to take such goods on board, and if they are shipped under a false description they may be thrown overboard.⁵ At any time before discharge they may be landed at any place, or destroyed, or rendered innocuous by the carrier without compensation, and "the shipper of such goods shall be liable for all damages "and expenses directly or indirectly arising out of or resulting from such shipment."⁶ This provision is merely de-

²⁶ *Stevenson v. Likly*, 1824, 3 S. 204.

²⁷ *Bradley v. Newsom, Sons & Co.*, 1919 A.C. 16, Lord Sumner, at 41.

²⁸ *M'Lean & Hope v. Fleming*, 1871, 9 M. (H.L.) 38, Lord Hatherley, L.C., at 42.

¹ *Macfarlane v. Robb & Co.*, 1870, 9 M. 370.

² See Bell, Comm. ii., 99; Prin., secs. 430-434.

³ *Stroms Bruks Aktie Bolag v. J. & P. Hutchison*, 1905, 7 F. (H.L.) 131, Lord Davey, at 136, Lord Macnaghten, at 134.

⁴ Merchant Shipping Act, 1894, *supra*, sec. 447.

⁵ *Ibid.*, sec. 448.

⁶ Carriage of Goods by Sea Act, 1924 (14 & 15 Geo. V. c. 22), sec. 6 (2); Schedule IV., art. 6.

claratory of the common law of Scotland, by which a carrier may refuse to receive dangerous goods.⁷ The owner of a British seagoing ship or of any share therein is altogether exempt from liability for any loss or damage happening without his actual fault or privity—(i) “Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship; or (ii) where any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with, or secreting thereof.”⁸ The owners of a British or foreign ship “where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship,” without their actual fault or privity, may limit their liability in terms of the Merchant Shipping Act.⁹

Law to be Applied.—In affreightment the question of the law to be applied is one of considerable difficulty, not only because the contracting parties may be of different nationalities, but also because the contract may be for performance between countries to which neither party belongs. Moreover, the bill of lading is delivered at the port of loading, whereas the charter party is frequently made elsewhere. As in ordinary contracts, however, the general rule applies, that the intention of the parties which *prima facie* is in favour of the *lex loci contractus* will govern if clearly expressed, but in the absence of proof of intention the law of the flag of the ship is applied.¹⁰ The same rule applies to the rights and obligations of the parties under the contract, and to the validity of stipulations in the contract itself.¹¹ Procedure, including the manner of proving and the method of enforcing the contract, is determined by the *lex fori*.¹²

⁷ Bell, *Prin.*, sec. 159.

⁸ Merchant Shipping Act, 1894, *supra*, sec. 502.

⁹ Merchant Shipping Act, 1894, *supra*, secs. 503-509.

¹⁰ *Lloyd v. Guibert*, 1865, 1 Q.B. 115.

¹¹ *In re Missouri S.S. Co.*, 1889, 42 Ch.D. 321, Chitty, J., at 327.

¹² *Owners of Ship "Immanuel" v. Denholm & Co.*, 1887, 15 R. 152.

CHAPTER VI.

SALVAGE.

Elements of a Salvage Service.—The jurisdiction in salvage of the Scottish Courts is confined to civil salvage or service to property exposed to the dangers of the sea. Military salvage or service in recovering property from the enemy in time of war is exclusively assigned to the Prize Court. Civil salvage may be defined as a voluntary personal service successfully rendered to property in danger at sea, and each of these elements requires to be present in order to render a salvage award competent. Thus, the service must be voluntary.¹ The test of voluntariness, however, is applied only as between the salvor and the salvaged property, and, accordingly, the salvor's claim is in no way prejudiced by the fact that he has been ordered to perform the service by a person who has control of his movements, as in the event of his vessel being under requisition by the Government.² The service must be successful and confer some benefit on the owner of the salvaged property,³ and all persons who have contributed to the success are entitled to an award. The principle has been thus summarised—"Success is necessary for a salvage reward. Contributions to that success, or, as it is sometimes expressed, meritorious contributions to that success, give a title to salvage reward. Services, however meritorious, which do not contribute to the ultimate success do not give a title to salvage reward."⁴ If the service has been rendered at request, a reward may be given, even if the salvage has not been completed, since "if a salvor is employed to do a thing and does it, and the property is ultimately saved, he may claim a salvage award, although the thing he does has produced no good results."⁵ In this case, however, the reward is in the nature of recom-

¹ *Clan Steam Trawling Co., Ltd. v. Aberdeen Steam Trawling and Fishing Co., Ltd.*, 1908 S.C. 651.

² *The "Sarpent"*, 1916, P. (C.A.) 306.

³ *Duke of Portland v. s.s. "Audek" Shares Co., Ltd.*, 1900, 8 S.L.T. 81.

⁴ *Owners of s.s. "Melanie" v. Owners of s.s. "San Onofre"*, 1925 A.C. 246, Lord Phillimore, at 262 (1); cf. *Walker v. North of Scotland Steam Navigation Co.*, 1892, 19 R. 386.

⁵ *The "Tarbert"*, 1921, P. 372, Hill, J., at 376; cf. *Ross & Marshall v. Owners of s.s. "Davaar"*, 1907, 15 S.L.T. 29.

pense, not salvage. Similarly, on the ground of public policy and in order to encourage salvage services, it has been held that a payment in the nature of recompense may be allowed even in the event of entire non-success.⁶ This is consistent with the common law of Scotland.⁷ In such a case it is unnecessary to determine whether the services were of the nature of salvage or merely towage.⁸ The salvage of a requisitioned ship may confer a benefit on the owner, even if he has a potential claim against the requisitioning Government for the loss of his vessel in their service, if the vessel is actually preserved by the service and its continuing hire by the Government ensured.⁹ For the purpose of salvage the expression "property" has been held to include "a ship, her apparel, and her cargo, including flotsam, jetsam, and lagan, each of them part of the cargo of a ship," but not to extend to all property exposed to the perils of the sea and used to assist navigation. Accordingly, a gas float shaped like a vessel but unfitted for navigation is not a subject of salvage, since it is neither a ship nor part of a ship, nor of her apparel or cargo.¹⁰ An aircraft may be the subject of salvage, and the law of salvage applies to aircraft on or over the sea or tidal waters as it does to vessels.¹¹ It is essential that the property should be preserved from danger, although the danger need not be either immediate or absolute.¹² Although salvage is essentially a sea service, the same principles apply to the case of corresponding services rendered in rivers.¹³ The term "salvage" is also applied to the reward given for salvage services. In this sense, and for the purposes of the Merchant Shipping Act, "unless the context otherwise requires," salvage "includes all expenses properly incurred by the salvor in the performance of the salvage services."¹⁴

Nature of Salvor's Right.—The right to a salvage award is in no sense based on contract either express or implied, nor on agency,¹⁵ but is entirely *sui generis* and based on a moral obliga-

⁶ *The "August Korff,"* 1903, P. 166.

⁷ Bell, Prin., sec. 538.

⁸ *Lawson v. Grangemouth Dockyard Co.*, 1888, 15 R. 753.

⁹ *The "Meandros,"* 1925, P. 61.

¹⁰ *The Gas Float "Whitton (No. 2),"* 1896, P. (C.A.) 42, Lord Esher, M.R., at 49; 1897 A.C. 33.

¹¹ Air Navigation Act, 1920 (10 & 11 Geo. V. c. 80), sec. 11.

¹² *The "Strathnaver,"* 1875, 1 A.C. 58, at 65.

¹³ *The "Carrier Dove,"* 1863, 2 Moo. P.C.C. 243.

¹⁴ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 510.

¹⁵ *The "Kenora,"* 1921, P. 20, Hill, J., at 96.

tion on the part of the owners of the salvaged property to which a legal liability has been attached in virtue of the property having been saved.¹⁶ For this reason, where a contractual obligation exists, and the contract for any reason falls, the salvor may nevertheless be entitled to a salvage award, provided that he has contributed in some degree to the safety of the ship.¹⁷ Similarly, he may be entitled to an award even if his services have been accepted under protest and in obedience to superior orders, as in the event of the salvaged vessel being under convoy.¹⁸ Since, therefore, the award is based on a moral obligation, and is made on grounds of public policy and of the advantage of trade, and since if the services are unsuccessful no award at all is due, it is correspondingly greater than it would be if a claim was brought at common law.¹⁹

Contracts of Salvage.—Although a right to salvage is not based on contract, the Court will nevertheless give effect to valid agreements relative to salvage made either between the salvor and the accredited agent of the salvaged property, by which the amount of the reward is fixed or between salvors *inter se* by which a reward already fixed is apportioned, provided always that such agreements are not inequitable.²⁰ In such cases the questions for the consideration of the Court are two in number, namely, whether the parties contracted on equal terms, and whether the sum agreed on is reasonable.²¹ To be binding, however, on the owners of the salvaged ship the agreement must be with some person having authority to represent the ship, and, accordingly, an agreement with underwriters to raise a wreck does not bind the owners.²² The owner of the salvaged ship may bind the master and crew as to the amount of the reward, in any event as regards future services.²³ It is doubtful, however, if the master has authority to bind the crew, although it is thought that he has as regards future services.²⁴ Neither the owner, however, nor the master have

¹⁶ *Clan Steam Trawling Co., Ltd. v. Aberdeen Steam Trawling and Fishing Co., Ltd.*, 1908 S.C. 651.

¹⁷ *The "Hestia,"* 1895, P. 193.

¹⁸ *The "Kangaroo,"* 1918, P. 325.

¹⁹ *Aitchison v. Lohre*, 1879, 4 A.C. 755, Lord Cairns, L.C., at 766.

²⁰ *Buchanan v. Barr & Shearer*, 1867, 5 M. 973; *The "Hestia,"* 1895, P. 193, Bruce, J., at 199.

²¹ *The "Rialto,"* 1891, P. 175.

²² *The "Solway Prince,"* 1896, P. 120.

²³ *The "Friesland,"* 1904, P. 345.

²⁴ Kennedy on Civil Salvage, 2nd edn., 252.

authority to bind the cargo or its owners.²⁵ An agreement made with one salvor does not bind other independent salvors unless they have impliedly accepted it by their actings.²⁶ The question whether services are salvage proper or merely contractual is one of fact which was at one time determined by a jury.¹ Such questions are, however, now generally regarded as unsuitable for a jury, and are seldom sent to jury trial.

Life Salvage.—By statute the right to a salvage award has been conferred on persons who have rendered service in saving life from any British or foreign vessel “wholly or in part “within British waters,” and on persons who have rendered services “elsewhere” in saving life from any British vessel.² In cases where the Government of a foreign country has assented, awards may be made to persons saving life from vessels belonging to that country, even when the ship herself is “beyond the limits of British jurisdiction.”³ This provision has as yet only been extended to Prussia.⁴ The award is payable “by the owner of the vessel, cargo, or apparel saved,” and in certain events the Board of Trade may make an award out of the Mercantile Marine Fund.⁵ The right, however, to salvage is so essentially based on service to property that no award for life salvage is due unless property has also been saved,⁶ although no doubt recompense may be given. Benefit to property, however, is not the measure of liability to pay life salvage, and ship, cargo, and freight each contribute rateably.⁷ Liability is not confined to the actual legal owners of the property saved, but extends to persons having any interest therein which has been benefited by the property being saved.⁸ Claims for life salvage rank in priority to all other claims for salvage,⁹ and failure to render it where practicable is a misdemeanour.¹⁰ The expression “wholly or in part within British waters” has been differently interpreted in Scotland and in England. In

²⁵ *Anderson v. Ocean S.S. Co.*, 1884, 10 A.C. 107.

²⁶ *The “Charlotte,”* 1848, 3 W. Rob. 63.

¹ *Buchanan v. Barr & Shearer*, 1867, 5 M. 973.

² Merchant Shipping Act, 1894, *supra*, sec. 544.

³ *Ibid.*, sec. 545.

⁴ Order in Council, 7th April, 1864.

⁵ Sec. 544.

⁶ *The “Renpor,”* 1883, 8 P.D. 115.

⁷ *The “Fusilier,”* 1865, Br. & L. 341.

⁸ *Duncan v. Dundee, Perth, and London Shipping Co.*, 1878, 5 R. 742; cf. *infra*, p. 216.

⁹ Sec. 544 (2).

¹⁰ Maritime Conventions Act, 1911 (1 & 2 Geo. V. c. 57), sec. 6.

England, in a case where the crew of a foreign vessel had been rescued, 90 miles from the British coast, and afterwards brought to a British port, it was held that the salvage had been performed in part within British waters, it being observed that "what you have to look at is whether the salving vessel in the "course of effecting the salvage service is within British "waters," which is a question of fact.¹¹ In Scotland, where a rescue has been effected, 500 miles from the British coast, it was held that the salvage was complete when the crew were brought on board a British vessel, and, accordingly, that the services were not performed in whole or in part within British waters, even although the crew were ultimately brought into a British port.¹² In both cases the vessel was left derelict by the salvors, but afterwards salvaged and brought into a British port by another vessel. These decisions appear to be inconsistent, but may perhaps be reconciled on the view that in the former case the salvage to life and to property was regarded as a single operation rendered jointly by two vessels, whereas in the latter they were regarded as independent operations.

Persons Entitled to Recover Salvage.—It follows from the nature of salvage that the right to an award is essentially an equitable one dependent neither on contract, recompense, nor agency, but on benefit to the property saved. It has been observed that "the jurisdiction which the Court exercises in salvage cases is of a peculiarly equitable character. The right "to salvage may arise out of an actual contract, but it does not "necessarily do so. It is a legal liability arising out of the "fact that property has been saved, that the owner of the "property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him notwithstanding that he has not entered into any contract on "the subject."¹³ Accordingly, in all cases proof of service to the property is sufficient to establish a claim.

(a) Owner of Salving Ship.—The owner of the salving ship is entitled to an award although the services have not been personally rendered by him. Where the ship has been demised to a charterer, the charterer is *pro hac vice* in the position of an owner, and has the right of an owner to recover in respect of

¹¹ *The "Pacific,"* 1898, P. 170, the President, at 175.

¹² *Jorgensen v. Neptune Steam Fishing Co., Ltd.,* 1902, 4 F. 992.

¹³ *Five Steel Barges,* 1890, 15 P.D. 142, the President, at 146.

services rendered during the period of the charter.¹⁴ A charterer, however, whose interest in the vessel does not amount to a demise has no right to salvage, although the opinion has been expressed that he may have an equitable claim against the owner of the ship for delay and loss occasioned by the salvage services.¹⁵ If the owner of the salving ship is also owner of the salved ship, he has no right to recover in respect of services rendered to his own ship,¹⁶ but he is not debarred from recovering from the owner of the cargo.¹⁷ If he is merely the charterer of the salved ship, his right is not barred unless the terms of the charter party are such that possession and control of the salved ship have devolved upon him, and he is, therefore, in the position of her owner.¹⁸

(b) Master and Crew of Salving Ship.—The master and crew of the salving ship have a right to an award which is entirely independent of that of the owner, and they may, therefore, recover in cases where the owner's claim is barred, as through his being also owner of the salved ship, or through contract, or statutory provision,¹⁹ as in cases where the owners of the two ships are under mutual obligation to render salvage services to each other. To found a claim for salvage, however, by the master and crew, the services must be outwith the scope of their original contract of service, and not such as are covered by their wages.²⁰ The opinion has been expressed that the owners may bind the master and crew as regards future services by agreements to which the latter are not parties, but not as regards past services.²¹ The crew, including the officers, have a right entirely independent of that of the master, and he cannot bind them without consent by agreements regarding the amount of the reward, in any event in respect of services already rendered and rights already acquired.²² The statutory duty resting on "the master or person in charge of a vessel" to render assistance so far as possible to persons in danger at sea does not

¹⁴ *The "Scout,"* 1872, 3 Adm. & Ec. 512.

¹⁵ *The "Alfen,"* 1857, Swa. 189.

¹⁶ *The "Sappho,"* 1871, 3 P.C. 690.

¹⁷ *Cargo ex "Laertes,"* 1887, 12 P.D. 187.

¹⁸ *The "Collier,"* 1866, 1 Adm. & Ec. 66.

¹⁹ *Swanney v. Owners of s.s. "Citos"; Macaulay v. Owners of s.s. "Citos,"* 1925 S.L.T. 491.

²⁰ *The "Sappho,"* 1871, 3 P.C. 690.

²¹ *The "Friesland,"* 1904, P.C. 265.

²² *The "Britain,"* 1839, 1 W. Rob. 40.

“affect his right or that of any other person to salvage.”²³ The statutory duty imposed on “the master or person in charge of each vessel” in the event of collision to render assistance to the other vessel and to stand by her “until he has ascertained that she has no need of further assistance”²⁴ does not bar a claim to salvage on the ground that the service is not voluntary.²⁵ The general rule followed is that if a vessel is in no way to blame for the collision, and her services are in the nature of salvage, she is entitled to recover²⁶; but that if she is wholly or in part to blame no claim is allowed.²⁷ The primary meaning of the words “until he has ascertained that she has no need of further assistance” are until it is seen that the other vessel, though injured, can manage by herself. After the master and crew have been saved there is no obligation to stand by a vessel which will inevitably founder.²⁸ A seaman cannot by agreement “abandon any right that he may have or obtain in the nature of salvage.”²⁹ It is probable, however, that this provision is confined to seamen as defined in the Act, and does not apply to the master.² Where, however, a ship is appropriated to salvage service, a seaman may enter an agreement with respect to the remuneration to be paid to him for such service.³ The effect of this provision is merely to render such agreements not illegal, and the Court may decline to recognise them if they appear to be inequitable. It is probable that this provision also does not apply to a master.⁴ It has been held that it does not apply to agreements regarding apportionment of salvage.⁵ Subject to these provisions, an assignment or sale of salvage payable to a seaman “made prior to the accruing thereof” is not binding on the person making it.⁶ For salvage purposes, a ship’s boats are identified with the ship herself.⁷

²³ Maritime Conventions Act, 1911 (1 & 2 Geo. V. c. 57), sec. 6.

²⁴ Merchant Shipping Act, 1894, *supra*, sec. 422 (1).

²⁵ *Owners of s.s. “Melanie” v. Owners of s.s. “San Onofre,”* 1925 A.C. 246.

²⁶ *The “Beta,”* 1885, 5 Asp. M.L.C. 276.

²⁷ *The “Duc d’Aumale,”* 1904, P. 60.

²⁸ *Owners of s.s. “Melanie” v. Owners of s.s. “San Onofre,”* *supra*, Lord Phillimore, at 264.

¹ Sec. 156 (1).

² *The “Wilhelm Tell,”* 1892, P. 337.

³ Sec. 156 (2).

⁴ *Nicholson v. Leith Salvage and Towage Co., Ltd.,* 1923 S.C. 409, Lord Hunter, at 422.

⁵ *The “Wilhelm Tell,”* *supra*.

⁶ Sec. 212.

⁷ *The “Donna Barbara,”* 1831, 2 Hagg. Adm. 366, Sir C. Robinson, at 373.

(c) **Master and Crew of Salvaged Ship.**—The master and crew of the salvaged ship cannot obtain an award for services so long as they are in the relationship of servants to the owners, since it is implied in their contract that they exert themselves to the utmost in the service of the ship. Once, however, the contract of service has terminated, as by the *bona fide* abandonment of the ship, or by its capture by an enemy, they may render services for which salvage is recoverable.⁸ Since, however, it would be inexpedient and contrary to public policy to allow seamen on board a vessel in danger to convert themselves at will into salvors, the termination of the contract of service by abandonment of the ship is not to be lightly presumed, and seamen are at all times bound, while with their vessel, to exert themselves to the utmost in its service.⁹

(d) **Pilots.**—A pilot in charge of the salvaging vessel may recover salvage in appropriate circumstances, but one in charge of the salvaged vessel is not in the ordinary event entitled to salvage. He may, however, become so in circumstances of extreme danger and personal exertion.¹⁰ It is, however, not the practice of the Court to regard his claim with favour,¹¹ since its recognition would be neither in the interest of the shipping community nor in that of the pilot himself.¹²

(e) **Passengers.**—A passenger on board a distressed vessel is not in the ordinary event entitled to an award, since, unlike a seaman, he is entitled to consider his own safety first and to take the first opportunity of escape. If, however, an opportunity of escape has presented itself, and he has elected to remain in the ship and assist in saving her, the view has been taken that he is entitled to a salvage reward.¹³ The contrary has, however, been held in England.¹⁴

(f) **The Ship's Agent.**—Owing to his contractual relationship to the owner, and to the fact that he is seldom aboard ship, and therefore does not usually incur any risk either to person or property, a ship's agent is generally barred from obtaining

⁸ Bell, Comm. i., 593.

⁹ *The "Portreath,"* 1923, P. 155.

¹⁰ Bell, Comm. i., 594; *Akerblom v. Price*, 1881, 7 Q.B.D. 129, Lord Esher, M.R., at 135.

¹¹ *The "Jonge Andries,"* 1857, 11 Moo. P.C.C. 313.

¹² *The "Bedeburn,"* 1914, P. 146.

¹³ Bell, Comm. i., 594.

¹⁴ *The "Vrede,"* 1861, Lush. 322.

a salvage reward. On grounds of public policy, however, and in exceptional circumstances, his claim may be admitted.¹⁵

(g) **Public Servants.**—Officers and men of the Royal Navy as public servants have a duty to protect British vessels, and “it forms part of the instructions of every one of Her Majesty’s vessels that they shall render assistance to British vessels in distress.”¹⁶ Personal claims, however, by the commanders and crews of such vessels may now be allowed, subject to the consent of the Admiralty Commissioners.¹⁷ The Admiralty Commissioners are also themselves now entitled to claim in respect of the services of such ships or tugs belonging to them as are specially equipped with salvage plant.¹⁸ Officers and men of the coastguard are entitled to “remuneration” for their services from the owners of the property saved.¹⁹ Magistrates and revenue officers acting within the scope of their duty are not in the ordinary event entitled to salvage, but may recover in exceptional circumstances.²⁰ A Receiver of Wreck is only entitled to his statutory expenses and fees in respect of the execution of his duties,²¹ but for them he has the same rights and remedies as a salvor has for salvage and for services outwith his prescribed duties he may occasionally receive extra remuneration from the Board of Trade on special grounds. Substitutes of a Receiver are not deprived by reason of their acting for him of a right to salvage.²² In all cases of salvage by persons who owe a duty to the salvaged property it is necessary that the service should be clearly outwith and in excess of their duty.²³

(h) **Lifeboatmen.**—The launchers and crew of a lifeboat belonging to the Royal National Lifeboat Institution are entitled to an award in respect of services to property, but not to life, but when the lifeboat is employed in the salvage of property the

¹⁵ *The “Crusader,”* 1907, P. 196.

¹⁶ *The “Charlotte Wylie,”* 1846, 2 W. Rob. 495, Dr. Lushington, at 497.

¹⁷ Merchant Shipping Act, 1894, *supra*, sec. 557.

¹⁸ Merchant Shipping (Salvage) Act, 1916 (6 & 7 Geo. V. c. 41), sec. 1.

¹⁹ Merchant Shipping Act, 1894, *supra*, sec. 568.

²⁰ *The “Aquila,”* 1798, 1 C. Rob. 37; *The “Clifton,”* 1834, 3 Hagg. Adm. 117.

²¹ Secs. 511, 512, 567.

²² Sec. 516 (2).

²³ *Swanney v. Owners of s.s. “Citos”*; *Macaulay v. Owners of s.s. “Citos,”* 1925 S.L.T. 491.

salvors are liable to compensate the Institution for any damage sustained by the lifeboat in the course of such service.²⁴

(i) **Airmen.**—The owner of an aircraft is entitled to a reasonable reward for salvage services in any case where the owner of a ship would be so entitled.²⁵

(j) **Landowners.**—When damage is occasioned to land through salvage services rendered to vessels in distress, the owner or occupier of the land has a statutory right to compensation, which may be recovered in the same manner as salvage.²⁶

(k) **Foreigners.**—A foreign salvor of a British ship is not entitled to any special consideration in virtue of his foreign nationality.²⁷

(l) **Co-salvors.**—The claims of persons who intervene in the course of a salvage operation must be supported by proof of necessity, the rule being based on equitable grounds in the interests both of the owners of the salved property and of the original salvors.¹ If, however, they have acted meritoriously, they are entitled to share in the award, even if the part taken by them in the service would not in itself have produced the desired result.² But if they wrongfully dispossess the original salvors, they are not entitled to any award for any services which they may afterwards perform, and the whole award goes to the original salvors.³ The Merchant Shipping Act contains a statutory provision that persons who assist in salving vessels “wrecked, stranded, or in distress at any place on or near the coasts of the United Kingdom, or any tidal water within the limits of the United Kingdom,” or their cargo are entitled to “a reasonable amount of salvage.”⁴ This provision is primarily intended to protect the interests of persons rendering assistance to the Receiver of Wrecks, and the limits contemplated are probably those of the territorial waters of the United Kingdom.⁵

²⁴ *The “Cayo Bonito,”* 1904, P. 310.

²⁵ Air Navigation Act, 1920 (10 & 11 Geo. V. c. 80), sec. 11.

²⁶ Sec. 513 (2).

²⁷ *Greiff v. Owners of s.s. “Loch Kildonan,”* 1909, 1 S.L.T. 275.

¹ Bell, Comm. i., 594.

² *The “Atlas,”* 1861, 15 Moo. P.C.C. 329.

³ *The “Kathleen,”* 1872, 2 Asp. M.L.C. 367.

⁴ Sec. 546.

⁵ *The “Fulham,”* 1898, P. 206, Gorell Barnes, J., at 214.

Persons Liable for Salvage.—Liability to pay salvage rests on all “those who receive benefit and who would have suffered the loss from which the exertions of the salvors have saved them.”⁶ The benefit, however, need not be direct.⁷ In the majority of cases liability is based on ownership of the property saved, but, since the jurisdiction which the Court exercises in salvage cases is of a peculiarly equitable character, a person who has no legal title to the property, but is indirectly benefited by the preservation, may also be liable. Thus, liability has been held to rest on the builder of a vessel the property in which has already passed to a purchaser, although delivery has not yet been made, since he had in point of fact been benefited by the service.⁸ Proceedings should properly be taken against all the persons benefited, but in practice they are frequently taken only against the owner of the ship, who frequently pays the whole amount of the salvage. He may safely do so where he has obtained security from the other persons benefited or has the cargo in his possession, in which case he may exercise a possessory lien over it. He may also frequently recover on general average, although a salvage claim is not necessarily general average. Where the need for salvage services arises from the fault of the shipowners they bear the whole liability,⁹ and similar rules apply to charterers within the terms of the charter party.¹⁰

(a) The Owner of the Salvaged Ship.—The owner of the salvaged ship is liable for services rendered to her. The owner is personally liable on salvage agreements made by the master on his behalf¹¹; but if the agreement is inequitable it may be set aside.¹² Thus, if the agreement has been made by the master merely for the purpose of saving himself and the crew, it is probable that it is not binding on the owner.¹³

(b) The Master.—The master is personally liable on contracts of salvage made by him. In cases where he improperly exhibits distress signals he is by statute personally liable to pay compensation for “any labour undertaken, risk incurred, or loss

⁶ Bell, *Comm. i.*, 597.

⁷ *The “Fusilier,”* 1865, Br. & L. 341, Dr. Lushington, at 347.

⁸ *Five Steel Barges*, 1890, 15 P.D. 142.

⁹ *Park v. Duncan & Son*, 1898, 25 R. 528.

¹⁰ *Cargo ex “Port Victor,”* 1901, P. (C.A.) 243.

¹¹ *The “Prinz Heinrich,”* 1883, 13 P.D. 31.

¹² *The “Medina,”* 1876, 1 P.D. 272.

¹³ *The “Renpor,”* 1883, 8 P.D. 115.

"sustained" in consequence of the exhibition of such signals, which may be recovered in the same manner as salvage without prejudice to any other remedy available.¹⁴ If, however, the signals are properly exhibited in the first instance, but the services subsequently become unnecessary, no liability is incurred by him.¹⁵ The master and crew, and possibly also the pilot, incur no liability in respect of salvage of their personal effects.¹⁶ Passengers are not liable in respect of their wearing apparel.¹⁷

(c) **Freight Owner.**—Since no liability exists where no benefit is received, the freight owner is liable only when the freight is at risk, as when it is dependent on delivery of the cargo. Thus, it is not at risk if it has been paid in advance.¹⁸

(d) **Cargo Owner.**—Similarly, the cargo owner is only liable when the cargo is saved in such a condition as to be worth the freight. Thus, where the ship and cargo had been salvaged and sold by the salvors, and restitution of their proceeds to the owners had been decreed, subject to the payment of salvage, it has been held that, since the proceeds of the cargo fell short of the sum due to the shipowner for freight, the cargo owner was not liable to contribute to the salvage, but that the shipowner was liable for the whole in respect of the ship and freight.¹⁹ The case of life salvage, however, forms an exception from the general rule, in respect that on grounds of public policy owners of freight and cargo may be required to contribute rateably, whether their property has been saved or not.²⁰ A claim may be made against the cargo owner in circumstances where it is not competent against the shipowner, as where a contractual obligation has been incurred by the salvor not to claim against the shipowner.²¹ Salvage agreements made by the master are not binding on the cargo owner.²²

(e) **Underwriters.**—Underwriters may be liable under the terms of their insurance policy to reimburse the owners of

¹⁴ Sec. 434 (2).

¹⁵ *The "Elswick Park,"* 1904, P. 76.

¹⁶ Kennedy on Civil Salvage, 2nd edn., 202.

¹⁷ *The "Willem III.,"* 1871, 3 Adm. & Ec. 487.

¹⁸ *Cargo ex "Galam,"* 1863, Br. & L. 167.

¹⁹ *Cox v. May,* 1815, 4 M. & S. 151.

²⁰ *The "Fusilier,"* 1865, Br. & L. 341.

²¹ *The "Leon Blum,"* 1915, P. (C.A.) 290.

²² *Anderson v. Ocean S.S. Co.,* 1884, 10 A.C. 107.

ship freight and cargo for salvage paid by them for services in saving the ship from perils insured against.²³ In an action brought at common law against underwriters by a shipowner to recover sums paid by him as salvage under the decree in a previous action in Admiralty, in which the loss had been held to be due to perils of the sea, the underwriters are not barred from pleading that the loss did not in fact arise from such perils, since a previous judgment whether *in personam* or *in rem* is only conclusive as to the point actually decided.²⁴ A lender on bottomry or respondentia does not contribute to salvage,²⁵ nor does the private property of an independent sovereign.¹

Liability of the Ship: (a) Maritime Lien.—The ship is subject both to a maritime and to a possessory lien for salvage. It is thought that the maritime lien for salvage, like that for wages, originated in possession of the property by the salvors, since “neither salvors nor seamen would relinquish possession of the *res* until security had been given, and, if it were not, they would obtain payment from the proceeds of it.”² The lien attaches to the ship and cargo, and also to the freight in cases where freight has been saved.³ It precedes all liens which have previously attached to the property, but is postponed to subsequent liens for damage by collision or salvage.⁴ By statute, however, it may be abandoned on a written agreement of security being given by the master of the salvaged ship binding the salvaged property and its respective owners for payment of such sum as may be adjudged to be due by the Court. Such an agreement “may be adjudicated on and enforced” in the High Court in England, and the duty rests on “any Court exercising Admiralty jurisdiction in Scotland” to assist that Court in enforcing it.⁵

(b) Possessory Lien: (1) General Principles.—Owing to the existence of a maritime lien, the possessory lien for salvage seldom requires to be exercised. It differs from the possessory lien, which exists at common law

²³ *Greiff v. Owners of s.s. "Loch Kildonan,"* 1909, 1 S.L.T. 275.

²⁴ *Ballantyne v. MacKinnon*, 1896, 2 Q.B. 455.

²⁵ *Park on Marine Insurance*, 897.

¹ *The "Alexander,"* 1815, 2 Dods, 37.

² *Roscoe's Admiralty Practice*, 33.

³ *The "Westminster,"* 1841, 1 W. Rob. 229.

⁴ *The "Veritas,"* 1901, P. 304.

⁵ Secs. 554, 561 (2).

in respect that from the nature of salvage services it arises in cases where there is no contractual relationship, either express or implied, between the salvor and the owner of the salvaged property, and it appears to be based merely on the equitable ground that "a person who by his own labour preserves goods, which the owner or vendor entrusted with the care of them either abandoned in distress at sea or are unable to protect and secure, is entitled by the common law of England to retain possession of the goods saved until an appropriate compensation is made to him for his trouble."⁶ It attaches both to the ship and to her cargo.⁷ Owing to the commercial importance of ships and the inconvenience which it necessarily occasions to the owners of the salvaged vessel and cargo, and owing also to the existence of the maritime lien, which is independent of possession, Courts of Admiralty jurisdiction regard its exercise with disfavour. Thus, it has been observed that "it is perfectly true that it is laid down by some authorities that there is a right to possession in salvors; but it is a defence never received by this Court without just consideration. I cannot conceive that there could be any rule more mischievous to commercial contracts at large and to the property salvaged than that it should be held that under whatever circumstances it was the duty of the salvors to retain the property."⁸ Accordingly, unless the salvor can prove that he would otherwise lose the security for his reward, or is justified by the peculiar circumstances of the case, the Court will mark its disapproval of the exercise of the lien by refusing expenses,⁹ by reducing the award,¹⁰ or in special circumstances by withholding the award altogether.¹¹ In any event, possession must be surrendered on consignment of the full amount of the claim.¹²

(2) *In Case of Derelict.*—These principles, however, do not apply to the case of derelicts to the same extent, and in such cases, since they have been abandoned by their owners, there is no obstacle to the salvor retaining possession of the derelict until he has been remunerated.¹³

⁶ Abbott on Shipping, 14th edn., 961.

⁷ Bell, Comm. ii., 103.

⁸ *The "Lady Worsley,"* 1855, 2 Spinks, 253, Dr. Lushington, at 255.

⁹ *The "Pinna,"* 1888, 6 Asp. M.L.C. 313.

¹⁰ *The "Glasgow Packet,"* 1844, 2 W. Rob. 306.

¹¹ *The "Champion,"* 1863, Br. & L. 69.

¹² *Mackenzie v. Steam Herring Fleet, Ltd.,* 1903, 10 S.L.T. 734.

¹³ *Cosman v. West,* 1887, 13 A.C. 160, at 181.

(3) *In Case of Wreck*.—In the case of wreck, the exercise of the possessory lien is directly discountenanced by the Legislature. If a salvor without reasonable cause fails to deliver to the Receiver of Wrecks a wreck which he has either taken possession of within the limits of the United Kingdom, or which he has brought within these limits, he is liable to a fine and to the forfeiture of his claim of salvage.¹⁴ It has been pointed out that this provision is intended to apply only to the case of improper or criminal detention, and not to the case of persons who restore the property to its rightful owners, since any other construction would be repugnant both to the principles of maritime law and to public policy.¹⁵ To take a wreck "found on or near the coasts "of the United Kingdom or any tidal water within the limits "of the United Kingdom to a foreign port and to sell it "there is a criminal offence."¹⁶ These principles obviously do not apply to the period during which the salvage operation is taking place. Throughout this period, which in the case of a wreck may be a prolonged one, the salvor is legally entitled to retain possession, and any interference with his possession will found a claim for damage in Admiralty.¹⁷ The owners also have a similar right of action.¹⁸ It is thought that a salvor in possession of a wreck is in the position of a depositary for the owner.¹⁹ In the case of subjects such as wrecks, which are not capable of complete physical control, it is probable that possession may be acquired by such incomplete acts of *dominium* as the subject itself is capable of.²⁰ Where salvage is due to any person under the Merchant Shipping Act, the Receiver of Wrecks is under the duty of detaining the property which is liable until security is given to his satisfaction, when it may be released²¹; and it has been held that after such release on security the salvor has no right himself to detain the property or to arrest it.²² Interfering with or secreting a wreck is a penal offence.²³ If the Receiver of Wrecks has

¹⁴ Merchant Shipping Act, 1894, *supra*, sec. 518; Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), sec. 72.

¹⁵ *The "Zeta,"* 1875, 4 Adm. & Ec. 460.

¹⁶ Merchant Shipping Act, 1894, *supra*, sec. 535.

¹⁷ *The "Tubantia,"* 1924, P. 78.

¹⁸ *MacDowall v. MacDowall*, 1825, 1 W. & S. 22.

¹⁹ Cf. *The "Zelo,"* 1922, P. 9.

²⁰ *The "Tubantia," supra.*

²¹ Sec. 552.

²² *The "Lady Katherine Barham,"* 1861, Lush. 404.

²³ Sec. 536.

reason to believe that a wreck is being concealed, he may obtain a warrant to search for, seize, and detain it.²⁴ When services which fall short of salvage, as in the case of towage, are rendered under contract there appears to be no reason in principle why a possessory lien at common law should not be exercised by the person rendering them.

Jurisdiction of Sheriff Court: (a) Statutory Jurisdiction.

—A special summary jurisdiction in salvage is conferred on the Sheriff Court by the Merchant Shipping Act, 1894, which provides that the Sheriff may “ summarily in manner provided “ by this Act ” determine “ disputes as to the amount of salvage whether of life or property, and whether rendered “ within or without the United Kingdom, arising between the “ salvor and the owners of any vessel, cargo, apparel, or wreck,” provided that they are not settled “ by agreement, arbitration, or otherwise ” in the following cases:—

- “ (a) In any case where the parties to the dispute consent;
- “ (b) In any case where the value of the property saved
“ does not exceed one thousand pounds;
- “ (c) In any case where the amount claimed does not
“ exceed in Great Britain three hundred pounds
“ . . . ”²⁵

It is probable that the cases here enumerated are alternative and not cumulative, and that the expression “ disputes as to “ the amount of salvage ” includes also questions regarding its apportionment.¹ The expression “ amount claimed ” appears to refer to the amount claimed before any legal proceedings are taken.² The jurisdiction is expressly confined to disputes arising between “ the salvor and the owners of any “ vessel, cargo, apparel, or wreck,” and, accordingly, it is probable that it does not extend to claims against underwriters.³ In the event of salvage of wreck the jurisdiction is confined to the “ Court or arbitrators having jurisdiction “ at or near the place where the wreck is found,” and, where services are rendered to property or life, to the “ Court or arbitrators having jurisdiction at or near the place where the “ vessel is lying or at or near the port in the United Kingdom

²⁴ Sec. 537.

²⁵ Sec. 547.

¹ The “ *Glannibanta*,” 1876, 2 P.D. 45.

² The “ *William & John*,” 1863, Br. & L. 49.

³ *Summers v. Buchan*, 1891, 18 R. 879, Lord Trayner, at 884.

“into which the vessel is first brought after the occurrence
 “by reason whereof the claim of salvage arises.”⁴ The expression “wreck” as here used includes “jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water.”⁵ The expression “at or near the place where the vessel is lying” means at or near the place where the vessel is brought immediately after the occurrence, and does not apply to any place where she may afterwards be when a dispute arises.⁶ Similarly, the value of the property saved is determined at the time when it is first brought into safety, and not at any subsequent period.⁷ The expression “at or near the port in the United Kingdom into which the vessel is first brought after the occurrence” should be construed reasonably. Accordingly, the mere presence of a pier, jetty, and lock at the entrance to a canal does not make the place a “port” in the sense of the section.⁸

Procedure to be followed.—The expression “summarily in manner provided by this Act” is nowhere defined. It is obvious that in the circumstances of the case it cannot refer to the special provisions of the Act regarding procedure in Scotland.⁹ It is equally clear that the procedure adopted in “summary applications” or “summary causes” is inappropriate unless in exceptional circumstances. Accordingly, it is probable that the only procedure which can properly be adopted is the ordinary procedure of the Sheriff Court, expedited so far as may be to meet the circumstances, and that the words “summarily in manner provided by this Act” are “just an expression meant to cover all cases in which jurisdiction is by the summary provisions of this Act conferred on the inferior Courts.”¹⁰

The Act further provides that “any matter or thing which may be done” under the part of the Act dealing with wreck and salvage “by or to a justice of the peace or a Court of summary jurisdiction may in Scotland be done by or to the Sheriff of the county.”¹¹ Appeal lies to the Court of Session “in like manner as in the case of any other judgment in

⁴ Sec. 548 (1).

⁵ Sec. 510.

⁶ *Summers v. Buchan*, *supra*.

⁷ *The “Stella,”* 1867, 1 Adm. & Ec. 340.

⁸ *Reid v. Couper*, 1907, 23 Sh.Ct.Rep. 234.

⁹ *Sinclair v. Spence*, 1882, 10 R. 1077.

¹⁰ *Thirtle v. Copin*, 1912, 29 Sh.Ct.Rep. 13, Sheriff MacLennan, K.C., at 19.

¹¹ Sec. 570.

"Admiralty or maritime cause of the . . . Sheriff's Court."¹² In the event of salvage disputes being sent to arbitration, it is a frequent practice to hear them on documentary evidence alone and without the assistance of nautical assessors. It has been observed that similar facilities may well be given in Courts of law in minor salvage claims, and that the judges of the Admiralty Division in England are agreed that "this is a mode of procedure which can be of use in the shipping world, and that it is a procedure for which the Court should endeavour to give proper facilities."¹³ The general intention of the provisions regarding summary procedure is to provide a convenient, inexpensive, and expeditious remedy in claims for salvage in cases where, owing to the restricted value of the claim, proceedings *in rem* would be inappropriate. At the same time, provision is made to preserve the security of the salvaged property for the claimant by the powers which are conferred on the Receiver of Wrecks for the district to retain the property in his possession, and, if he thinks fit, to realise it on security.¹⁴

(b) **Ordinary Jurisdiction.**—The jurisdiction thus conferred on the Sheriff Court is expressly confined to summary procedure and to "disputes as to the amount of salvage." It does not, therefore, interfere in any way with the ordinary jurisdiction of the Court in disputes regarding the existence of a claim for salvage. In such cases any modification of the ordinary jurisdiction would be inappropriate, since difficult questions of law might be involved, and in any event it would be inconsistent with the jurisdiction of the Court as conferred by the Court of Session Act, 1830.¹⁵

Jurisdiction of Court of Session.—The Act provides that, subject to the special provisions of the Act, "disputes as to salvage shall be determined by . . . in Scotland the Court of Session."¹⁶ It is thought that this provision is framed with particular reference to the jurisdiction of the English Courts in salvage, and that it is not intended to confer a privative jurisdiction on the Court of Session or to confine the jurisdiction of the Sheriff Court to the cases above enume-

¹² Sec. 549 (1) (a).

¹³ *The "River Fisher,"* 1923, 39 T.L.R. 233, the President, at 233.

¹⁴ Sec. 552; see *infra*, p. 230.

¹⁵ 1 Wm. IV. c. 69, secs. 21-22; see *Waterford and Duncannon Steamboat Co., Ltd. v. Ford Shipping Co., Ltd.*, 1915, 2 S.L.T. (Sh.Ct.) 192.

¹⁶ Sec. 547 (2).

rated. It is probable that the expression "disputes as to salvage" as here used has the same meaning as disputes as "to the amount of salvage" in the preceding sub-section,¹⁷ and, therefore, that the ordinary jurisdiction of the Sheriff Court in questions regarding the existence of a claim remains unaltered.

The Act further provides that, "subject to the provisions of this Act . . . in Scotland the Court of Session, shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect of which salvage is claimed were performed on the high seas, or within the body of any county, or partly on the high seas and partly within the body of any county, and whether the wreck in respect of which salvage is claimed is found on the sea or on the land, or partly on the sea and partly on the land,"¹⁸ and that "nothing in this Act shall be held in any way . . . to give to the High Court in England any jurisdiction in respect of salvage in Scotland which it has not heretofore had or exercised."¹⁹

The Act also provides that "disputes relating to salvage may be determined on the application either of the salvor or of the owner of the property saved, or of their respective agents."²⁰ Here also it is probable that the Act refers to disputes relative to the amount of salvage. In one case where the owners of a salvaged ship had admitted liability for salvage and granted a bail bond in security of the claim they proceeded by petition under this provision to the Court of Session to have the amount of salvage determined, and suggested that a remit should be made for that purpose to a Lord Ordinary.²¹

Procedure: (1) *Procedure in rem*.—Owing to the nature of a salvage service and to the fact that the property itself is liable for the reward, and that a maritime and a possessory lien attach to it, it has been pointed out that in claims for salvage "the first and most proper remedy is *in rem*."²²

(2) *Procedure in personam*.—*Procedure in personam* is,

¹⁷ *Waterford and Duncannon Steamboat Co., Ltd. v. Ford Shipping Co., Ltd.*, *supra*.

¹⁸ Sec. 565.

¹⁹ Sec. 710.

²⁰ Sec. 547 (3).

²¹ *Elderslie S.S. Co., Ltd. v. Burrell & Son*, 1895, 22 R. 389.

²² *Hatton v. Aktieselskabet Durban Hansen*, 1919 S.C. 154; Bell, Comm. ii., 103.

however, in Scotland the more usual procedure,²³ and in certain circumstances may be necessary, as in cases where the property is situated abroad, and so is not subject to the jurisdiction, or the foundation of the claim is a contract or it is based on a right of recompense. A claim based on contract, however, does not necessarily preclude proceedings *in rem*, provided always that the services rendered under the contract amount to salvage, since the maritime and possessory liens can then both be exercised.

(3) *Action of Multiplepounding*.—It has been held that where liability is admitted a multiplepounding may be raised to determine the persons entitled to the salvage, leaving the questions of the amount and its apportionment to be determined in subsequent proceedings. In such a case, if the total amount of the salvage has already been determined, any claimant has an interest to challenge the claim of any other as possibly reducing the share which will accrue to him, but if the amount has not yet been determined he has no interest to challenge other claims, since his own is not thereby affected.²⁴ It is improbable that this procedure will now be followed.

(4) *Statutory Procedure*.—By statute the owner of salvaged property or his agent for him may initiate proceedings to have "disputes relating to salvage" determined.²⁵ It is probable that this provision refers to disputes relating to the amount of salvage with which the section in which it is contained is primarily concerned. No particular form of procedure is provided, and the provision has seldom been put in operation in Scotland, but in one case procedure was by petition to the Court of Session.²⁶ It has been observed that it "cannot well be made applicable to a foreign ship, which can only be subjected to the jurisdiction of the Courts by arrestments."¹ Summary procedure has already been considered.²

Conjunction of Actions.—Salvage actions are generally appropriate for conjunction, since the claims all arise out of the same event and are all directed against the owners of the

²³ *Duncan v. Dundee, Perth, and London Shipping Co.*, 1878, 5 R. 742.

²⁴ *Robinson v. Thoms*, 1851, 13 D. 592.

²⁵ Merchant Shipping Act, 1894, *supra*, sec. 547 (3).

²⁶ See *supra*, p. 224.

¹ *Wilson v. Rapp*, 1911 S.C. 1360, Lord Ordinary (Salvesen), at 1362.

² *Supra*, p. 222.

same property. Thus, actions by the owners, master, and crew of a salving vessel, or of two or more salving vessels, may be conjoined. Such actions may be conjoined even if consent is withheld, the chief considerations which will influence the Court being those of convenience and economy. Thus, it has been observed that "it seems now to be settled in England, "after some conflict of opinion, that where there are several "suits at the instance of salvors who are all claiming to be "rewarded by the owners of one vessel, such suits should be "consolidated, unless there is a risk of injustice being done "to the rival claimants. This practice was fixed by the decision in the case of *The 'Strathgarry,'* 1895, p. 264, overruling a previous practice under which the Court refused to "consolidate except of consent of parties. I see no reason to "doubt that the Admiralty jurisdiction of the Court of Session "is as wide in such matters as that of the Admiralty Court in "England; and that this Court has power to direct, apart from "the consent of parties, how suits which relate to the same "subject-matter shall be tried."³ Conjunction may take place even where the interests of the several claimants are opposed.⁴ Thus, when averments in two actions were at variance as regards the persons who had rendered the service, but were otherwise similar, the actions were conjoined.⁵ Again, where ten actions of salvage had been raised and cross-actions had been brought against two of the pursuers by the owners of the salvaged ship for damage sustained in the course of the salvage operation and the two pursuers were at issue regarding their liability for the damage, the ten actions were nevertheless conjoined.⁶ In England the Court has gone so far as to consolidate actions arising out of two distinct salvage operations.⁷ In cases where claimants have unjustifiably opposed conjunction, and so caused unnecessary expense, the fact may be taken into consideration in the award of expenses.⁸ When actions have been thus conjoined the Court will in general appoint one of the claimants to conduct the case so far as common to all,⁹ but if a conflict of interest appears likely to emerge,

³ *Wilson v. Rapp*, 1911 S.C. 1360, Lord Ordinary (Salvesen), at 1362.

⁴ *Boyle v. Olsen: Lindsey Steam Fishing Co., Ltd. v. Aktieselskabet Bonheur*, 1912 S.C. 1235.

⁵ *Wilson v. Rapp*, *supra*.

⁶ *Owners of the "St. Clair" v. Owners of the "Audny"*, 1922 S.C. 85.

⁷ *The "Strathgarry,"* 1895, P. 264.

⁸ *The "Bentley,"* 1857, Swa. 198.

⁹ *Wilson v. Rapp*, *supra*.

separate representation will be allowed. If, however, the counsel of one claimant desires to cross-examine the witnesses of another, it is necessary that this should be expressly allowed in the interlocutor by which the actions are conjoined.¹⁰ Where some of the salvors have failed to join in an action which concludes for apportionment, the Court will deduct from the sum apportioned an amount equal to the share which such salvors might have been entitled to had they joined in the action.¹¹ In such cases the action should be intimated to the salvors who have failed to join in it, but it is unnecessary to call them either as defenders or to see and hear decree pronounced.¹² Conclusions for apportionment are, however, more appropriate where all parties are present. Similar considerations apply to actions against separate defenders, as in cases where the owners of ship, freight, and cargo are sued individually. In such cases "every consideration both of authority "and principle points to the convenience and, indeed, the justice of the owners of ship, freight, and cargo being all before "the Court when the amount of salvage is to be determined," not only because it is unjust that one party should allow another to defend an action and then take advantage of his defence, but also because it is very difficult to estimate the sum to be paid by the ship apart from the cargo.¹³ In cross-actions the practice is similar, and for similar reasons. Thus, an action by a salvor based on a salvage contract and a counter action by the owner of the property for damages for failure to deliver the vessel on an offer being made to consign the full amount of the liability under the contract have been conjoined.¹⁴

Tender.—The special considerations which prevent a tender in cross-actions for damage by collision being regarded as a binding admission of liability appear to apply also to some extent in salvage.¹⁵ There does not, however, appear to be any express decision in Scotland. In England the following principles have been applied:—In salvage actions it is peculiarly difficult for either party to form a correct estimate

¹⁰ *Boyle v. Olsen ; Lindsey Steam Fishing Co., Ltd. v. Aktieselskabet Bonheur*, 1912 S.C. 1235.

¹¹ *Le Jouet*, 1872, 3 Adm. & Ec. 556.

¹² *Bennet v. Henderson*, 1887, 24 S.L.R. 625.

¹³ *The "Elton"*, 1891, P. 265, Jeune, J., at 270.

¹⁴ *Mackenzie v. Steam Herring Fleet, Ltd.*, 1903, 10 S.L.T. 734; cf. *Grangemouth and Forth Towing Co., Ltd. v. s.s. "River Clyde" Co., Ltd., et c contra*, 1908, 16 S.L.T. 405, 638.

¹⁵ See *supra*, p. 183.

of the value of the services which have been rendered, and, accordingly, the rejection of a tender does not necessarily imply liability for full expenses. At common law, if a tender is made and rejected and it is afterwards held to be sufficient, the tenderer generally receives the expenses of the action, but in salvage actions this rule cannot be rigidly applied, since, as has been pointed out, "in the very nature of salvage services " there is something so loose and indefinite and so difficult to " be determined by the best-constituted minds when looking " at their own case that I am not inclined to press the doctrine " to its full extent."¹⁶ Accordingly, a tenderer has been condemned in costs up to the date of payment of the tender into Court, and thereafter none held due to or by either party.¹⁷ A salvor, however, who unjustifiably refuses an offer made before action is raised may be condemned in full costs.¹⁸ The difficulty of estimating correctly the value of a salvage service is one which affects the salvor as well as the owner of the salvaged property, since " there are circumstances which render " it peculiarly difficult, if not impossible, for plaintiffs in salvage actions to form an estimate of the amount to which " they are entitled for the services which they have rendered. " In the first place, the amount of their remuneration depends " to some extent on the value of the salvaged property, and of " this they are seldom aware until after proceedings have gone " some length. Again, from motives of public policy and from " the nature of the services rendered their title to remuneration is not a mere *quantum meruit*."¹⁹ For these reasons, it has been held that a tender in a salvage action is not a binding admission of the amount due on the part of the defender, nor does its rejection necessarily involve the pursuer in liability for expenses.²⁰

Cumulo Tender.—In general a *cumulo* tender to meet two separate actions of salvage will not be recognised, even although both actions arise out of the same salvage operation. In England, however, in a case where two plaintiffs had unjustifiably refused to consolidate their actions, it has been held that the defendant might be allowed to make a single tender for the whole services rendered, and might elect on which

¹⁶ *The " William,"* 1847, Notes of Cases, 108, Dr. Lushington, at 109.

¹⁷ *The " Lotus,"* 1882, 7 P.D. 199.

¹⁸ *The " William Symington,"* 1884, 10 P.D. 1.

¹⁹ *The " William Symington,"* *supra*, Butt, J., at 3.

²⁰ *The " Mona,"* 1894, P. 265.

action it should be made.²¹ When actions have been conjoined the general rule is that if the justice of the case demands it the tender should be apportioned.²² A number of exceptions are, however, admitted. Thus, it is unnecessary to apportion if the pursuers concur in accepting a *cumulo* offer.²³ Again, in the case of salvage of a derelict, it is obvious that the owners of the derelict can have no proper means of estimating the relative merits of the services rendered, and so of apportioning the award correctly, but it has been observed that if the owner's servants are present at the salvage operation and "able to give full information to the defendants as to the nature of the services and the particular service rendered by each set of salvors . . . In such a case as that I think the defendants should apportion."²⁴ From the nature of the case, however, accurate apportionment must be in all circumstances difficult. It is necessary that the acceptances in order to be valid should meet the tender, and if their aggregate amount exceeds the amount of the tender there is no acceptance. Thus, when a *cumulo* tender of £550 had been made and accepted without qualification by one pursuer, and by the other for the sum of £550, it has been held that there had been no valid acceptance. When a *cumulo* tender is accepted, but the pursuers are at variance regarding their respective shares, the expenses of proof of their relative claims follow the event.²

Limitation of Actions.—By statute it is provided that "no action shall be maintainable to enforce any claim or lien against a vessel or her owners . . . in respect of any salvage services unless proceedings therein are commenced within two years from the date when . . . the salvage services were rendered." The period, however, may in certain circumstances be extended.³

Valuation of Salvaged Property.—The valuation of the salvaged property should properly be made at the place where the salvage services terminated.⁴ In practice, however, for reasons of convenience it is usually made at the termination of the

²¹ *The "Jacob Landstrom,"* 1878, 4 P.D. 191.

²² *Boyle v. Olsen: Lindsey Steam Fishing Co., Ltd. v. Aktieselskabet Bonheur,* 1912 S.C. 1235.

²³ *Wilson v. Rapp,* 1911 S.C. 1360; *The "Creteforest,"* 1920, P. 111.

²⁴ *The "Burnock,"* 1914, 12 Asp. M.L.C. 490, Bargrave Deane, J., at 491.

² *Wilson v. Rapp, supra.*

³ Maritime Conventions Act, 1911 (1 & 2 Geo. V. c. 57), sec. 8, see *supra*, p. 98.

⁴ *The "Norma,"* 1860, Lush. 124.

voyage as part of general average. In certain circumstances it may be made by the Receiver of Wrecks.

Statutory Powers of Receivers of Wrecks: (a) To Value the Property.—"Where any dispute as to salvage arises" the Receiver of Wrecks of the district, "where the property is in respect of which the salvage claim is made" possesses a statutory power, to be exercised on the application of either party, to appoint a valuer to value the property, and he is required to furnish copies of the valuation to both parties.⁵ The opinion has been expressed that the only limitation of the jurisdiction of the Receiver under this provision is that the property shall be situated within his district.⁶ Copies of such a valuation purporting to be signed by the valuer and to be certified as true copies by the Receiver are "admissible in evidence in any subsequent proceeding."⁷ It has been held, however, that, apart from this provision, evidence given before a Receiver is not admissible in a salvage action unless an opportunity has been given for cross-examination.⁸

(b) To Detain the Property.—It is further provided that, "where salvage is due to any person under this Act the Receiver shall—(a) If the salvage is due in respect of services rendered in assisting any vessel, or in saving life therefrom, or in saving the cargo and apparel thereof, detain the vessel and cargo or apparel; and (b) if the salvage is due in respect of the saving of any wreck, and the wreck is not sold as unclaimed under the Act, detain the wreck,"⁹ and that the detention of the property shall continue "until payment is made for salvage or process is issued for the arrest or detention thereof by some competent Court."¹⁰ The expression "wreck" for the purposes of this provision includes "jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water."¹¹ The words "due to any person under this Act" include all salvage recoverable under the Act, and it has been observed that they "appear to have been used as a general expression to cover any salvage which the Act contemplated being awarded by the Courts mentioned

⁵ Merchant Shipping Act, 1894, *supra*, sec. 551 (1).

⁶ *The "Fulham,"* 1899, P. (C.A.) 251, Smith, L.J., at 261.

⁷ Sec. 551 (2).

⁸ *The "Little Lizzie,"* 1870, 3 Adm. & Ec. 56.

⁹ Sec. 552 (1).

¹⁰ Sec. 552 (2).

¹¹ Sec. 510.

"in it, the jurisdiction of which was conferred or recognised "by it."¹² The Receiver has no discretion to refuse to detain the property.¹³

(c) To Release the Property—Appeal to Court of Session.

—The Receiver may release the property "if security is given "to his satisfaction, or, if the claim for salvage exceeds two "hundred pounds and any question is raised as to the sufficiency of the security to the satisfaction . . . in Scotland of the Court of Session, including any division of that "Court, or the Lord Ordinary officiating on the Bills during "vacation."¹⁴ Any security given for salvage in pursuance of this provision to an amount exceeding two hundred pounds may be enforced by the Court of Session in the same manner as if caution had been given in that Court.¹⁵ In applications to the Court of Session for release procedure is by petition, which in vacation may be presented to the Lord Ordinary on the Bills, and the orders of the Lord Ordinary in such cases may be reviewed by the Inner House in the same manner as in other cases.¹⁶ The petition is in ordinary form. It should be served on the persons at whose instance the ship has been detained or on their agent and on the Receiver of Wrecks. The petitioner should reserve all competent objections regarding the legality of the detention and all claims and actions competent to the petitioner for loss occasioned thereby. Certificates by persons of skill regarding the value of the ship and cargo should be appended. Since the application is of a summary nature, a shortened *induciae* of forty-eight hours may be allowed.¹⁷

(d) To Sell the Property.—In certain events the Receiver may sell the detained property and apply the proceeds in payment of the "expenses, fees, and salvage," and pay the balance so far as not required for that purpose to the "owners of the "property or any other persons entitled to receive the same."¹⁸

Assessment of Award.—From the nature of a salvage service and the fact that the right to remuneration is based neither on contract, recompense, nor agency, it follows that no precise rules can be formulated for the assessment of the

¹² *The "Fulham,"* 1898, P. 206, Gorell Barnes, J., at 213.

¹³ *The "Fulham,"* 1899, P. (C.A.) 251, Vaughan Williams, L.J., at 264.

¹⁴ Sec. 552 (3).

¹⁵ Sec. 552 (4).

¹⁶ *Otis v. Kidston*, 1862, 24 D. 419.

¹⁷ *Otis v. Kidston*, 1862, *supra*.

¹⁸ Sec. 553.

award. Thus, it has been pointed out that "salvage expenses are not assessed upon the *quantum meruit* principle; they are assessed upon the general system of maritime law which gives to the persons who bring in the ship a sum quite out of proportion to the actual expense incurred and the actual service rendered, the largeness of the sum being based on this consideration, that, if the effort to save the ship (however laborious in itself and dangerous in its circumstances) had not been successful, nothing whatever would have been paid"¹⁹; and, again, "at the best in cases of this description all that can be done is what may be called rough justice. It is impossible nicely and accurately to measure in relation to the risks run and the services rendered the sum which ought to be awarded by the Court."²⁰

Elements of Award.—In assessing the award the following elements all require to be considered in varying degrees:—(1) The skill, courage, and energy of the salvor, (2) the labour and time devoted by him to the service, (3) the value of the salving ship, (4) the risk incurred by her, (5) the value of the salvaged property, (6) the imminence of the danger from which she has been preserved.²¹ It is not, however, the practice of the Court to assess these elements separately unless exceptional circumstances render such a course necessary, as in cases where the award requires to be apportioned between the owners and the master and crew. The elements of skill, courage, and energy can obviously only be considered relatively to the services of those taking a direct part in the operation. In estimating the element of time allowance may be made for the fact that a deviation from a voyage may have taken place which may possibly have vitiated an insurance policy, or have rendered the shipowner liable in damages to the cargo owner, and that the deviation may expose the ship to additional danger.²² Although a deviation to save property generally vitiates an insurance policy, a deviation to save life does not. For similar reasons, the value of the salving ship requires to be taken into consideration. The proper measure of value of the salvaged ship is her market value, and not her value to her owners. The

¹⁹ *Aitchison v. Lohre*, 1879, 4 A.C. 755, Lord Cairns, L.C., at 766.

²⁰ *The "Glengyle,"* 1898 A.C. 519, Lord Herschell, at 521; cf. *Greenock Towing Co. v. Anchor Line, Ltd.*, 1901, 9 S.L.T. 221; Bell, Comm. i., 598.

²¹ *Owners of s.s. "Vulcan" v. Owners of s.s. "Berlin,"* 1882, 9 R. 1057, Lord Deas, at 1062; *Owners of s.s. "Ben Alder" v. Owners of s.s. "Acacia,"* 1901, 3 F. 491; *Greiff v. Owners of s.s. "Kildonan,"* 1909, 1 S.L.T. 275.

²² *The "Sir Ralph Abercrombie,"* 1867, 1 P.C. 454.

value of running charter parties is too remote for consideration,²³ but freight earned subsequently to the operation may be allowed for.²⁴ The market value of the ship is her market value in her damaged condition at the termination of the service.²⁵ The Court will, however, only take into consideration the net value of the property saved, and, accordingly, if an award has already been made in another Court of competent jurisdiction, allowance will be made for the sum there awarded.¹ In the case of derelicts a specially liberal award is given, since they have been abandoned by their owners,² and a similar practice is followed in the case of passenger ships.³ Where the salving ship is one specially equipped for salvage service a liberal award is given on the ground of public policy.⁴ In the case of salvage by His Majesty's ships the elements of time, risk to the salving ship, and exertion of the crew may be disregarded. The two former are at the expense of the public, while the last may be no greater than that to which the crew are accustomed in their ordinary work. The award is therefore small.⁵

Allowance for Damage.—In addition to the salvage award proper, the damage sustained and the expenses incurred by the salving ship may be taken into account, and should, if possible, and if the damage is considerable and the service not trivial and the value of the salvaged property sufficiently high, be ascertained separately and with precision by evidence; but where this is done the remuneration for the exertions and risk of the salvor will be assessed on a more moderate scale.⁶ Where, however, these elements are not present, or the damage cannot be ascertained precisely, as in the event of the salving ship subsequently becoming a total wreck, it is sufficient to award a lump sum covering both salvage and damage.⁷ In so far as the damage is due to risks undertaken voluntarily and unnecessarily by the salvor no allowance will be made.⁸

²³ *The "San Onofre,"* 1917, P. 96.

²⁴ *The "Kaffir Prince,"* 1917, P. 26.

²⁵ *The "Hohenzollern,"* 1906, P. 339.

¹ *The "Antelope,"* 1873, 4 Adm. & Ec. 33.

² *The "Louisa,"* 1906, P. 145.

³ *The "Ardencaple,"* 1834, 3 Hagg. Adm. 151.

⁴ *The "Glengyle,"* 1898 A.C. 519.

⁵ *The "Carrie,"* 1917, P. 224.

⁶ *The "De Bay,"* 1883, 8 A.C. 557.

⁷ *Greiff v. Owners of s.s. "Loch Kildonan,"* 1909, 1 S.L.T. 276.

⁸ *Steel v. Hutchison,* 1909, 2 S.L.T. 110.

There is, however, a presumption that damage sustained by the salving ship is caused by the necessities of the service.⁹ Damage caused by stranding after the service has been rendered may be treated as damage sustained in the course of the service.¹⁰ Consequential damage may be taken into account, such as that incurred by a salving trawler owing to the necessity of selling her fish at the port to which the salvaged vessel is taken instead of at her port of destination.¹¹ It has been held in England that, although loss of fishing profits may be allowed for, it will not be taken directly into consideration.¹²

Amount of Award.—Awards vary so indefinitely in amount that no principle can be deduced from their examination, and “in every case of a claim for salvage one must deal with the special circumstances which the case presents, because you cannot find or almost never can find any one case precisely on all fours with others where the very same considerations come into force and with the same weight.”¹³ In special and exceptional circumstances the entire proceeds of the property may be awarded, as in the case of the salvage of a derelict.¹⁴ The awards in a large number of cases have been analysed in Pritchard’s Admiralty Digest.¹⁵ Ship freight and cargo each contribute rateably to the award, but in special circumstances separate awards may be made against them if the risks are shown to be different, as in the case of a specially perishable cargo.¹⁶ Frequently the whole award is recovered from the shipowners, and the other parties contribute by general average. No reduction will be made by reason of the fact that the salving vessel is insured.¹⁷

Alteration of Award by Court of Appeal.—In altering a salvage award the Court does not act on the same grounds as it would in setting aside the verdict of a jury. Regarding the considerations which will influence an Appeal Court, it has been observed that “. . . it would need a case exceptional and extraordinary to induce this House to interfere with an

⁹ *Master and Owners of s.s. “Baku Standard” v. Master and Owners of s.s. “Angèle,”* 1901 A.C. 549.

¹⁰ *The “Melanie,”* 1924, 40 T.L.R. 236.

¹¹ *The “Marburg” v. The “Strathbogie,”* 1903, 11 S.L.T. 314.

¹² *The “Fairport,”* 1912, P. 168.

¹³ *Owners of s.s. “Ben Alder” v. Owners of s.s. “Acacia,”* 1901, 3 F. 491, Lord Trayner, at 496.

¹⁴ *The “Louisa,”* 1906, P. 145.

¹⁵ Pp. 1920-2118.

¹⁶ *The “Velox,”* 1906, P. 263.

¹⁷ *Greiff v. Owners of s.s. “Loch Kildonan,”* 1909, 1 S.L.T. 275.

"award made by the learned judge of the Admiralty Court and affirmed by the Court of Appeal. Unless we were to see that some of the elements which ought to be taken into account had been overlooked, or that an altogether exaggerated importance had been given to some of the elements of the case—in short, that the principles which are recognised and settled had not been satisfactorily and truly and properly applied—I think this House would not interfere with the award."¹⁸ The Court will, however, interfere if it is clear that the award is unreasonable in the sense of being unjust either to the salvor or to the owner of the salvaged property.¹⁹ The discretion, however, of the trial judge is wide, and it has been pointed out that the question whether an award is unreasonable can hardly arise unless the Appeal Court can say that the trial judge has misapprehended the facts or has acted contrary to a recognised principle of law.²⁰ An Appeal Court will, however, more readily review the award of a judge of first instance in cases where it has the assistance of a nautical assessor and the judge of first instance has not.²¹

Apportionment of Award: Procedure.—In the majority of cases the award is apportioned by the Court which assesses it, and it is competent to include conclusions for this purpose in the summons of the action.²² Where, however, such conclusions have been omitted, or the amount of the award has already been determined, or the amount of remuneration has been conceded, a separate action for apportionment may be raised. The owner of the salvaged property or his agent have themselves statutory powers to initiate such an action.²³ In apportioning an award the Court applies the *lex fori*, as in a matter of remedy, but in the case of a dispute concerning apportionment arising among the owners and persons in the service of a foreign vessel it is expressly provided that the amount shall be apportioned "in accordance with the law of the country to which the vessel belongs."²⁴

¹⁸ *The "Glengyle,"* 1898 A.C. 519, Lord Herschell, at 520; cf. *Owners of s.t. "Ben Alder" v. Owners of s.s. "Acacia,"* 1901, 3 F. 491, Lord Justice-Clerk, at 496; *Liverpool Steam Tug Co., Ltd. v. Cornfoot,* 1900, 2 F. 1060, Lord Trayner, at 1065.

¹⁹ *The "Port Hunter,"* 1910, P. (C.A.) 343.

²⁰ *The "Star of Persia,"* 1887, 6 Asp. M.L.C. 220, Lord Esher, M.R., at 221.

²¹ *Owners of Tug "Cruiser" v. Master of s.s. "Taquary,"* 1913 S.C. 1107, Lord Salvesen, at 1112.

²² Jur. Styles iii., 175.

²³ Sec. 547 (3), see *supra*, pp. 224, 225.

²⁴ Maritime Conventions Act, 1911 (1 & 2 Geo. V. c. 57), sec. 7.

Statutory Provisions for Apportionment: (a) By Receiver of Wrecks.—Provision is made in the Merchant Shipping Act for apportionment by the Receiver of Wrecks “where
“the aggregate amount of salvage payable in respect
“of salvage services rendered in the United Kingdom
“has been finally determined either summarily or in
“manner provided by this Act or by agreement, and does
“not exceed two hundred pounds,” and a dispute “arises as
“to its apportionment, the person liable therefor” may apply to the Receiver for liberty to “pay the same to him, and the
“Receiver shall, if he thinks fit, receive the same accordingly,” whereupon the Receiver shall grant him a certificate discharging him of his liability, and “shall with all convenient speed distribute any amount received by him under
“this section among the persons entitled to the same on such
“evidence and in such shares and proportions as he thinks fit,
“and may retain any money which appears to him to be payable to any person who is absent.”²⁵ A distribution thus made by a Receiver is “final and conclusive as against all
“persons claiming to be entitled to any portion of the amount distributed.”¹ The procedure is intended to expedite the proceedings and save expense.

(b) By a Court of Admiralty Jurisdiction.—“Whenever
“the aggregate amount of salvage payable in respect
“of salvage services in the United Kingdom has been
“finally ascertained, and exceeds two hundred pounds, and
“whenever the aggregate amount of salvage payable in respect
“of salvage services rendered elsewhere has been finally ascertained, whatever that amount may be, then, if any delay or
“dispute arises as to the apportionment thereof, any Court
“having Admiralty jurisdiction may cause the same to be
“apportioned amongst the persons entitled thereto in such
“manner as it thinks just, and may for that purpose, if it
“thinks fit, appoint any person to carry that apportionment
“into effect, and may compel any person in whose hands or
“under whose control the amount may be to distribute the
“same, or to bring the same into Court to be there dealt with
“as the Court may direct, and may for the purposes aforesaid
“issue such processes as it thinks fit.”² For the operation of this provision it is essential that the nature of the services

²⁵Sec. 555 (1) and (2).

¹Sec. 555 (3).

²Sec. 556.

should have been already determined to be salvage and not towage, and in determining the limits of its jurisdiction the Court will consider the aggregate amount of salvage due and not the amount of each claim individually. The procedure to be followed is not clear. In one instance, where the total amount of the salvage had been paid to the shipowner, a claimant raised an action against him for the proportion of the salvage due to him. Applications in the Small Debt Court are incompetent where the aggregate amount of salvage is outwith the jurisdiction of the Court even if the individual claim is within it, since the claim truly affects the amount of the share due to every person entitled to the salvage. In any event the Small Debt Court has no appropriate procedure.³

Rules of Apportionment.—The award is apportioned according to the value of the services rendered. Since the application of power to the propulsion of ships, the proportion awarded to the owner of the salving ship has been considerably increased. Formerly, when sailing ships were universal, the claims of the owner were regarded as inconsiderable, since the services were effected mainly by the personal exertions and at the personal risk of the master and crew. It is, however, now recognised that the greater part of the risk to property, and the entire expense of the operation are incurred by the owner of the ship, and the risk of damage to a power-driven vessel engaged in towing another, is considerable. For these reasons the proportion of the award made to the owner had been greatly increased, and three-quarters of the total has not infrequently been awarded to him in England, although there is no fixed rule.⁴ In Scotland the owners have on occasion received as much as two-thirds⁵ and five-sixths of the total.⁶ Of the remainder of the award the master, since he has all the responsibility of the operation and a large share of the work, is entitled to a large share, but in cases where the manager or agent of the company to which the vessel belongs is present at and superintends the operation, he may obtain a larger share than the master.⁷ In the case of the crew special efforts will always receive a special reward,⁸ but in ordinary circumstances the

³ *Shaw v. s.s. "Falls of Inversnaid" Co.*, 1891, 8 Sh.Ct.Rep. 18.

⁴ *The "Gipsy Queen"*, 1895, P. 167.

⁵ *Bennet v. Henderson*, 1887, 24 S.L.R. 625.

⁶ *Fraserburgh and North of Scotland Steam Trawling Co., Ltd. v. Glen & Co.*, 1901, 8 S.L.T. 438.

⁷ *The "Tees"*: *The "Pentucket"*, 1862, Lush. 505.

⁸ *The "Skibladner"*, 1877, 3 P.D. 24.

crew, including the officers, are rewarded according to their rating as shown on the pay sheet. In case of large vessels a distinction is generally drawn between navigating members of the crew, among whom are included the engineering staff as well as deck hands and non-navigating members. The latter will in ordinary circumstances only receive a half-share according to their rating.⁹ The wireless operators, who are employees of the Marconi Company and whose names do not appear on the pay sheet, may perform meritorious services, which in appropriate circumstances will receive a special reward. The statutory provisions against seamen abandoning their rights in the nature of salvage¹⁰ do not apply to agreements regarding apportionment.¹¹ The reward of passengers and pilots varies with the nature of the work done by them.¹² As between two or more sets of co-salvors apportionment is in accordance with the values of their respective services. Where the services are not contemporaneous, and they are acting independently, preference is generally given to those whose services are first in point of time,¹³ and if a second set of salvors interferes unwarrantably with the first they will receive nothing,¹⁴ but if their interference is justified and necessary they will receive a larger share.¹⁵

Forfeiture of Salvage.—By misconduct the salvor may entirely forfeit his right to salvage, and, failing forfeiture, the amount of the award may be reduced.¹⁶ The forfeiture affects not only those guilty of the misconduct, but also those who are privy to it, or who by their negligence have enabled it to take place or to be undetected.¹⁷ Thus, where the misconduct is that of the master within the scope of his authority, the right of the owner, master, and crew may all be forfeited, that of the owner because the master is his agent, that of the master because he is the actual wrongdoer, and that of the crew on grounds of public policy.¹⁸

⁹ *The "Spree,"* 1893, P. 147, Gorell Barnes, J., at 152.

¹⁰ Secs. 156, 212.

¹¹ *The "Wilhelm Tell,"* 1892, P. 337.

¹² *The "Perla,"* 1857, Swa. 230; *The "Santiago,"* 1900, 9 Asp. M.L.C. 147.

¹³ *The "Liviatta,"* 1883, 8 P.D. 24.

¹⁴ *The "Fleece,"* 1850, 3 W. Rob. 278.

¹⁵ *The "Pickwick,"* 1852, 16 Jur. 669.

¹⁶ *The "Clarisse,"* 1856, Swa. 129.

¹⁷ *The "Clan Sutherland,"* 1918, P. 332.

¹⁸ *The "Duc d' Aumale (No. 2),"* 1904, P. 60.

Salvage of Foreign Ships: Forum non conveniens.—In the event of salvage services to a foreign vessel the force of the plea of *forum non conveniens* largely depends on the situation of the vessel at the time when proceedings are taken. If the vessel has been brought to a Scottish port and is arrested within the jurisdiction it follows, both from the nature of the service, from the fact that maritime and possessory liens attach to it, and from the fact that the first and most proper remedy is *in rem*, that a plea of *forum non conveniens* will generally be repelled even if the salvage operation has itself taken place on the high seas or within foreign territorial waters. In such circumstances, if a plea of *forum non conveniens* were sustained, the salvor would require either to raise a personal action at the place of domicile of the owner or, if he desired to proceed *in rem*, to wait until the vessel was in a condition to return to its home port—an event which in the case of a disabled vessel might be a remote one, and in the case of a total wreck might never occur. If, however, the vessel is taken to a foreign port immediately on the conclusion of the salvage operation, the position is entirely different. The property is then under the jurisdiction of another Court, and the only course open to a salvor desiring to obtain a remedy in this country is to raise a personal action based on the arrestment either of another vessel or of other property belonging to the same owner, to which the maritime and possessory liens cannot attach. In such a case a plea of *forum non conveniens* might be sustained. This view appears to be consistent with the provisions of the Merchant Shipping Act, which does not appear to contemplate the possibility of claims for life salvage being made for services rendered wholly outwith the jurisdiction. Thus, it expressly provides for the payment of life salvage for services to a foreign vessel only in the event of the service being rendered “wholly or in part “within British waters,”¹⁹ in which case either the property is within the jurisdiction *ab initio* or the presumption arises that it will be brought into a British port on the completion of the service. If, however, the life salvage is rendered “when the “ship is beyond the limits of British jurisdiction,” life salvage may only be awarded by a British Court if the Government of the country to which the vessel belongs is willing that such an award should be made.²⁰ In such a case there is, of course,

¹⁹ Sec. 554 (1).

²⁰ Sec. 545.

no presumption that the vessel will be brought into a British port on the completion of the service.

Expenses: (a) General Rules.—In salvage actions the ordinary rule is in general followed, and expenses follow the event. The expenses of a successful action are borne by the ship, cargo, and freight in proportion to their respective values, which for this purpose is taken to be the value upon which they contribute to the salvage award.²¹ The expenses of an unsuccessful action are borne by the claimants in proportion to the amount of their claims. In cases where co-salvors unjustifiably refuse to conjoin their actions the extra expenditure thereby incurred will be deducted from their expenses,²² and the expenses of only one action will be allowed.²³ In cases where an owner claims an award in respect of two of his vessels, and succeeds only in respect of one, it has been held that he is only entitled to half the expenses of the claim in respect that he has only succeeded in half of it, and similarly in such circumstances where a cross-action for damage is brought, although the claim is disallowed he is only entitled to half his expenses in the cross-action on the ground that he is only successful in respect of one of the vessels.²⁴ It has been held that the expenses of arresting a vessel in an action *in rem* for salvage which has been properly raised and abandoned may be recovered in a subsequent personal action against the same parties arising out of the previous action on the ground that the arrestment is merely an initiatory step in the action which has been quite properly raised.²⁵ Where a ship had been detained by a Receiver of Wrecks at the instance of the salvor, and only released on a bail bond being given for an excessive amount, it has been held that the salvor was liable to the owner of the ship in the expenses of obtaining the bail bond in so far as these exceed a reasonable sum.¹ Where a tender had been made before the closing of the record, and before acceptance, the pursuers had instructed a marine surveyor to report

²¹ *Hicks v. Governor and Company of London Assurance Co.*, 1895, 1 Com. Cas. 244.

²² *The "Hestia"*, 1895, P. 193.

²³ *The "Creteforest"*, 1920, P. 111.

²⁴ *Grangemouth and Forth Towing Co., Ltd. v. s.s. "River Clyde" Co., Ltd.*, 1908, 16 S.L.T. 638.

²⁵ *Hatton v. Aktieselskabet Durban Hansen*, 1909 S.C. 154, Lord President, at 156.

¹ *Walker v. Steam Trawl Fishing Co., Ltd. v. Mitre Shipping Co., Ltd.*, 1913, 1 S.L.T. 67.

on the condition of the ship and a man of business on that of the cargo, the expenses of both have been allowed.²

(b) Where Claimant Fails to Recover more than £300.—

When an action is raised in the Court of Session, and the pursuer fails to recover more than £300, the Merchant Shipping Act, 1894, provides that he is not entitled to expenses unless the Court certifies that "the case is a fit one to be tried otherwise than summarily in manner provided by this Act."³ Such a certificate may be granted in the following cases:—In cases where difficult questions of fact are involved, such as the question whether the services are properly towage or salvage⁴; in cases where difficult questions of law are involved,⁵ such as the question whether a towage contract has been superseded by a right to salvage⁶; in cases where the action has been transferred to the superior Court on the motion of the defenders to enable it to be conjoined with other actions brought against them⁷; in cases where there is a conflict of evidence.⁸ A certificate has been granted on the ground that the case was equally suitable for trial in the Court of Session and in the Sheriff Court, and that, therefore, it could not be positively affirmed that it was unsuitable for trial in the Court of Session.⁹ It has been pointed out that *prima facie* the inferior Court is the proper tribunal for trial of such cases, and that, therefore, the onus of raising the question of expenses rests on an unsuccessful or only partially successful pursuer by way of a motion that a certificate should be granted, whereas in the ordinary case the onus would rest on an unsuccessful defender to show reason why the successful pursuer should be penalised in expenses.¹⁰ Where the claim exceeded £300 and the defender did not consent to trial in the Sheriff Court and the pursuer was compelled in consequence to proceed in the Court of Session, it was held that neither party was entitled to the expenses of the Sheriff Court proceedings, it being pointed out that the defender had forced the pursuer to proceed in the Court of

² *Aberdeen Steam Trawling and Fishing Co., Ltd. v. Marine Navigation Co. of Canada, Ltd.*; *Flett v. Marine Navigation Co. of Canada, Ltd.*, 1922 S.L.T. 394.

³ Sec. 547 (2).

⁴ *Lawson v. Grangemouth Dockyard Co.*, 1888, 15 R. 753.

⁵ *The "Minnehaha"*, 1861, 15 Moo. P.C.C. 133.

⁶ *The "Bengal"*, 1869, 3 Adm. & Ec. 14.

⁷ *The "Lepanto"*, 1892, P. 122.

⁸ *Ross & Marshall v. Owners of s.s. "Davaar"*, 1907, 15 S.L.T. 29.

⁹ *Newhaven Trawlers, Ltd. v. Devlin*, 1902, 9 S.L.T. 382.

¹⁰ Roscoe's Admiralty Practice, 417.

Session, and that, therefore, the pursuer was not liable for expenses as in an abandoned action in the Sheriff Court.¹¹

(c) **On Appeal.**—In cases where an award is reduced on appeal the former practice was to find no expenses due to or by either party for the appeal.¹² Now, however, the ordinary rule of an Appeal Court is followed, and, if the award is substantially reduced, expenses are allowed as in the case of a successful appeal.¹³

¹¹ *Bain, Morrison & Co. v. Stangeland*, 1920, 36 Sh.Ct.Rep. 250.

¹² *The "Gipsy Queen"*, 1895, P. 167.

¹³ *The "Toscana"*, 1905, P. (C.A.) 148.

CHAPTER VII.

TOWAGE.

Jurisdiction.—Towage as a ground of claim distinct from salvage has only emerged at a comparatively recent date. Towage by a vessel under sail is necessarily a difficult and dangerous operation, and on the rare occasions on which it is undertaken it generally forms part of a larger salvage operation. Prior to the application of power to the propulsion of ships a towage claim was almost unknown. In 1840, however, an Admiralty jurisdiction, both *in rem* and *in personam*, was created in England in "all claims and demands whatsoever . . . in the nature of towage."¹ For this reason, as also from the nature of the service itself, it is not unreasonable to regard it as a maritime cause and to assign it to the Admiralty jurisdiction also in Scotland.

Nature of the Service.—A towage service is essentially contractual, and has been defined as "the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating her progress."²

Nature of a Towage Contract.—The general principles which determine the legal relations of the tug and tow *inter se* and with third parties are those of maritime law, and the same both in Scotland and in England.³ Owing, however, to the nature of the case and to the mutual obligations which are implied in it, the contract is of a special character.

(a) Conditions Implied.—The relative duties of the tug and tow, so far as not expressly varied by agreement, have been described as follows:—"When the contract was made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each; and that neither vessel, by

¹ Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), sec. 6.

² *The "Princess Alice,"* 1848, 3 W. Rob. 138, Dr. Lushington, at 140.

³ *M'Cowan v. Baine & Johnston*, 1891, 18 R. (H.L.) 57, Lord Watson, at 61.

“neglect or misconduct, would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If, in the course of the performance of this contract, any inevitable accident happened to the one, without any default on the part of the other, no cause of action would arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and would create no liability on the part of the other. If, on the other hand, the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not by any misconduct or unskilfulness on her part contributed to the accident.”⁴ The implied obligation of the tug is that “when a steam tug engages to tow a vessel for a certain remuneration from one point to another, though she does not warrant that she will be able to do so, and will do so under all circumstances and at all hazards; she does engage that she will use her best endeavours for that purpose, and will bring to the task competent skill, and such a crew, tackle, and equipment as are reasonably to be expected from a vessel of her class, and she will not be relieved from her obligation because unforeseen difficulties occur or because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended.”⁵ A certain discretion is, however, allowed to the master of the tug regarding the mode of performance.⁶

(b) **Extraordinary Towage.**—A towage service may be rendered in ordinary or in extraordinary circumstances. In the ordinary case the undertaking of a tug is merely to tow the vessel which employs her from one place to another at the rates which generally prevail in such circumstances, but where the tug meets with a disabled vessel, and makes a bargain to bring her to a place of safety, the towage is extraordinary, and the master of the tug “must be bound by that bargain, and any accident that may happen afterwards, any difficulty that may arise, any delay that may be interposed, in the performance of that service he, of course, must put up with, because he takes the chances and makes a bargain to cover all such risks as these.”⁷

⁴ *The “Julia,”* 1860, 14 Moo. P.C.C. 210, at 230.

⁵ *The “Minnehaha,”* 1861, 15 Moo. P.C.C. 133, at 152.

⁶ *New Steam Tug Co., Ltd. v. M’Clew,* 1869, 7 M. 733.

⁷ *The “Kingalock,”* 1854, 1 Spinks, 263, Dr. Lushington, at 264.

(c) **Impossibility of Performance.**—In a contract of towage impossibility of performance is less readily presumed than in an ordinary contract, since it is contrary to public policy that a contract of towage should be lightly presumed to have been extinguished, and “to hold . . . that the moment the “performance of the contract is interrupted or its completion in “the mode originally intended becomes impossible the tug is “relieved from all further duty, and at liberty to abandon the “ship in her charge to her fate would be . . . incon- “sistent with the public interests.”⁸

(d) **Indivisibility of Contract.**—For similar reasons the contract is treated as indivisible, and it has been held in England that where its complete performance is prevented by events beyond the control of either party no award on a *quantum meruit* basis is due, but that, if the performance is prevented solely by the action of the tow, as by abandonment of the ship, the tug is entitled to an award.⁹ In Scotland, however, where the principles on which *quantum meruit* awards are made are to some extent different, it does not necessarily follow that the same rule will be applied.¹⁰

Procedure.—Actions of towage are generally personal, and there appears to be no instance in Scotland of proceedings *in rem* being taken as for towage. Towage services are, however, frequently rendered in circumstances similar to those of salvage or form part of a salvage operation. Moreover, services which originated in towage may, owing to supervening dangers, develop into salvage, and in such cases the pursuer will generally claim the higher reward which salvage confers. He may thus acquire a right to proceed *in rem*. The fact that a claim for salvage is made does not preclude an award as for towage.

Right of Claimant: (a) Where Towage only is Claimed.—Where towage only is claimed no salvage award will be made, since the claim is essentially of a different nature, and the principles applicable to the assessment of the reward are different.

(b) Where Salvage is Claimed and Awarded.—In this case the ground of the claim may be either that the services were

⁸ *The “Minnehaha,”* *supra*, at 154.

⁹ *The “Glenmorven,”* 1913, P. 141; cf. *The “Queen of Australia,”* 1880, 4 Asp. M.L.C. 274, note.

¹⁰ Gloag on Contract, p. 257.

salvage *ab initio* or that services admittedly towage in origin have developed into salvage. Where towage services are alleged to have developed into salvage, the onus of proving the change of character of the service rests upon the pursuer.¹¹ The existence of a towage contract does not bar the right to the higher reward due for salvage, and if the tug "performs "duties which were not within the scope of her original engagement she is entitled to additional remuneration for additional services, and may claim as a salvor," but it has been observed that "such cases require to be watched with the "closest attention and not without some degree of jealousy," and the tug cannot be allowed to profit by its own inefficiency.¹² or by its own wrong, as by deliberately placing the tow in a position of danger.¹³ It is not necessary, however, "that the "supervening danger should be of such a character as actually "to put an end to the towage contract. It is sufficient if the "services rendered are beyond what could be reasonably supposed to have been contemplated by the parties entering into "such a contract."¹⁴ The two services, however, cannot exist contemporaneously, since salvage is essentially voluntary and towage essentially contractual. After the salvage service has terminated the towage service may be resumed, but during the interval it is suspended.¹⁵ The towage contract may, if necessary, be entirely set aside.¹⁶ In assessing the award the Court may proceed either on the assumption that the salvage services are additional to the towage services or that the services were entirely salvage *ab initio*.¹⁷ Since a towage service is purely contractual, generally the only person entitled to recover an award of towage is the owner of the tug, and for the same reason liability rests only on the owner of the vessel towed. If, however, a right to salvage emerges in the course of the action, the master and crew and others also acquire a right to a reward as salvors, and similarly liability rests on the owners of the cargo and freight as well as on the owner of the salvaged ship.¹⁸ For this reason the master and crew should be con-

¹¹ *The "Maréchal Suchet,"* 1911, P. 1.

¹² *The "Maréchal Suchet," supra.*

¹³ *The "Minnehaha,"* 1861, 15 Moo. P.C.C. 133, at 153, 155.

¹⁴ *Five Steel Barges,* 1890, 15 P.D. 142, the President, at 144.

¹⁵ *The "Leon Blum,"* 1915, P. 90, the President, at 101.

¹⁶ *Buchanan v. Barr & Shearer,* 1867, 5 M. 973.

¹⁷ *The "Minnehaha," supra.*

¹⁸ *Le Jouet,* 1872, 3 Adm. & Ec. 556.

joined in the claim, or else the owner should sue as representing their interests. Similarly the action should be directed against the owners of cargo and freight as well as against the shipowner, unless it appears that they are liable to contribute to any award which may be made against the shipowner.

(c) **Where Salvage is Claimed and Refused.**—In this case an award as for towage may be made, and the fact that a tender has been made is immaterial.¹⁹ In England the rule is so far different that if salvage is claimed and refused and no claim of towage has been made the action fails and no towage reward is given.²⁰ If, however, a tender is made in name of towage, the action will not fail, but decree may be given for the amount of the tender.²¹

Liability of Tug and Tow to Third Vessels—Rule of Identification.—Owing to the “difficulties which would be occasioned “by two conflicting and independent authorities being “exercised in the navigation of one and the same “vessel,”²² and for the purpose of determining their liability for damage to third vessels, the tug and tow are generally regarded as identified for navigation purposes, and control of the navigation is presumed to be in one or other of them. They are then said to be “one ship,” but it has been pointed out that “the expression is figurative, and “must not be strained beyond the meaning which the learned “judges who have employed it intended it should bear.”²³ Regarding the question which vessel acquires the identity of the other, no positive rules can be laid down, but it is now “conclusively established that the question of the identity of “the tow with the tug that tows her is one of fact, not law, “to be determined upon the particular facts and circumstances “of each case.”²⁴ Certain presumptions, however, arise. In general the presumption is that control lies with the tow, even in cases where the tug supplies the motive power,²⁵ and this presumption is highest where the vessels are in harbour and

¹⁹ *Lawson v. Grangemouth Dockyard Co.*, 1888, 15 R. 753.

²⁰ *The “Strathnaver,”* 1875, 1 App.Cas. 58.

²¹ *The “Harbinger,”* 1852, 16 Jur. 729.

²² *The “Christina,”* 1848, 3 W. Rob. 27, Dr. Lushington, at 33.

²³ *M’Cowan v. Baine & Johnston*, 1891, 18 R. (H.L.) 57, Lord Watson, at 60.

²⁴ *Owners of s.s. “Devonshire” v. Owners of Barge “Lealie,”* 1912 A.C. 634, Lord Atkinson, at 656.

²⁵ *The “Christina,”* *supra*.

the tug is merely employed to warp the tow to her berth.²⁶ For obvious reasons, however, the contrary presumption arises where the towage is that of a disabled vessel. Where the tow is in fact in control of the navigation, and the relationship of master and servant exists between her and the tug, the general rule is that she is liable for the negligence of the latter, but, if the negligence is clearly due to the tug alone, the tow may be exempt from liability for damage to a third vessel by collision with the tug, even if she also herself collides with the third vessel.¹ The mere fact that the tug is in the position of servant to the tow is not in itself sufficient to relieve her of liability for her own negligence.² Where, however, the tow is merely one of a number of vessels being towed by a single tug, it is impossible to affirm that she is in control of the navigation, or that the relationship of master and servant exists between her and the tug, and in such circumstances no positive rule can be laid down regarding liability for a collision occurring between one of the towed vessels and a third vessel caused by the negligence of the tug.³ Where, on the other hand, the tow is completely under the control of the tug, and the relationship of master and servant does not exist, the tow is not responsible for the tug's negligence, and the latter may be liable for damage caused to a third vessel, either directly by herself or indirectly through her negligence by the tow.⁴ It follows from the above rules that personal liability for damage to third vessels is largely a question of fact which can only be determined on the particular circumstances of each case. Apart, however, from questions of personal liability, an innocent vessel, damaged by collision, acquires a maritime lien for the damage, and may proceed *in rem* against the vessel with which she has been in collision, and if the damaging vessel is held to be in fault, may recover from her the entire damage which she has sustained.⁵ Whether the remedy *in rem* is competent also against a ship which, without actually being in collision herself, is responsible by her negligence for a collision between two other vessels, as may not infrequently

²⁶ *Screw Tug Co., Ltd. v. Clyde Shipping Co.*, 1878, 2 Guthrie's Sh.Ct. Rep. 555.

¹ *The "American" and The "Syria"*, 1874, 6 P.C. 127.

² *The "Mary"*, 1879, 5 P.D. 14.

³ *The "Quickstep"*, 1890, 15 P.D. 196, Butt, J., at 199.

⁴ *Owners of s.s. "Devonshire" v. Owners of Barge "Leslie"*, 1912 A.C. 634.

⁵ *The "Avon" and The "Jolliffe"*, 1891, P. 7; *Owners of s.s. "Devonshire" v. Owners of Barge "Leslie"*, *supra*.

happen in a case of towage, is as yet undecided⁶; where the tug and tow are jointly responsible for damage to an innocent third ship, they are in the position of co-delinquents, and are therefore jointly and severally liable for the damage sustained.⁷

Rule of Division of Loss.—The relationship of master and servant between the tow and tug does not oust the Admiralty rule of division of loss where both ships are to blame either as between the tug and tow *inter se* or between the tug and tow and a third vessel. It has been held in England that where the tug and tow have thus been placed in the position of co-delinquents as regards a third vessel, the third vessel, even although she is also in part to blame, may recover from either vessel the total amount of the damage to which she is entitled, even if only one of them has been in actual collision.⁸ Her right in this respect is not limited by the Maritime Conventions Act, 1911.⁹ As between themselves the wrongdoing vessels may divide the loss in proportion to their liability.¹⁰

Liability of Tug and Tow *inter se*.—Subject to the above rules, the liability of the tug and tow *inter se* is determined by the ordinary principles of the law of reparation. As between the crews of the two vessels, however, the doctrine of common employment does not apply, even where the tow is in fact in control of the navigation and the relationship of master and servant exists between them. As between the vessels themselves, the rule laid down in *Priestley v. Fowler*,¹¹ that a master is only bound to take ordinary precautions for the safety of his servant, does not apply to prevent the tug in her capacity of servant of the tow recovering from the tow damage for an accident due to the negligent navigation of the latter.¹²

Possessory Lien.—No maritime lien for towage attaches to the vessel towed either in Scotland or England.¹³ There appears also to be no instance of the recognition of a possessory lien for towage. Towage of a vessel which had been abandoned

⁶ See *supra*, p. 160.

⁷ The "*Avon*" and The "*Joliffe*," *supra*.

⁸ The "*Englishman*" and The "*Australia*," 1894, P. 239.

⁹ 1 & 2 Geo. V. c. 57, sec. 1.

¹⁰ The "*Cairnbahn*," 1914 (C.A.), P. 25.

¹¹ 1837, 3 Mec. & Wels. 1.

¹² The "*Julia*," 1860, 14 Moo. P.C.C. 210, at 230.

¹³ *Westrup v. Great Yarmouth Steam Carrying Co.*, 1889, 43 Ch.D. 241.

by its owners would almost necessarily amount to salvage. In Scotland, however, at common law there is a "right to withhold or detain property or goods which are in any one's possession under a contract until indemnified for the labour or money expended on them"¹⁴; and circumstances may be figured in which this right might arise in respect of a towage service. A possessory lien would, of course, carry with it a remedy *in rem*.

Expenses.—Where the owner of two tugs is sued for breach of a contract of towage, and the action is abandoned as against one tug and fails as against the other and the owner is held entitled to expenses, it has been held that he is only entitled to half the total expenses incurred by him to the date of abandonment, even though only one defence has been lodged for the two tugs, since in law ships, even if they belong to the same owner, are separate entities, and the owner has only been successful in respect of one vessel.¹⁵

¹⁴ Bell, Comm. ii., 91.

¹⁵ *Grangemouth and Forth Towing Co., Ltd. v. s.s. "River Clyde" Co., Ltd., et e contra*, 1903, 16 S.L.T. 638.

CHAPTER VIII.

NECESSARIES.

Definition.—Necessaries are “such things as the owner of a vessel as a prudent man would have ordered had he been present at the time they were ordered as being fit and proper for the service on which the vessel was engaged.”¹ The term is applied only to indispensable repairs and furnishings, which were formerly confined to such articles as anchors, cables, sails, and provisions,² but to meet the exigencies of modern commerce its meaning has been extended from time to time to include such subjects as coals³ and canal dues.⁴ The meaning of the term varies to some extent according to the employment of the vessel, requirements being different in different trades. Thus, the requirements of the fishing trade are special. A distinction which was formerly drawn between necessaries for the vessel herself and necessaries for her voyage is no longer admitted.⁵ The term does not include unusual repairs or elaborate structural alterations,⁶ nor premiums of insurance,⁷ either on hull⁸ or freight.⁹ If necessaries have in fact been furnished, it is immaterial whether they have actually been applied to the use of the ship or not,¹⁰ and whether they have been furnished in a home or a foreign port.¹¹

Persons Entitled to Recover as for Necessaries.—The right to claim as for necessaries supplied is not confined to the person who has actually supplied them, but it has now been established that “the person • “who pays for the necessaries supplied to a ship has

¹ *Foong Tai & Co. v. Buchheister & Co.*, 1908 A.C. 458, Lord Atkinson, at 466.

² Bell, Comm. i., 518.

³ *Comtesse de Fregeville*, 1861, Lush. 329.

⁴ *The “Mecca,”* 1895, P. 95.

⁵ *The “Riga,”* 1872, 3 Adm. & Ec. 516.

⁶ *Steele & Co. v. Dixon*, 1876, 3 R. 1003.

⁷ *Cochrane v. Gilkison*, 1854, 16 D. 548.

⁸ *The “André Theodore,”* 1904, 10 Asp. M.L.C. 94.

⁹ *The “Heinrich Bjorn,”* 1883, 8 P.D. 151.

¹⁰ *Havilland, Routh & Co. v. Thomson*, 1864, 3 M. 313.

¹¹ *Lindsay v. Campbell*, F.C. 18th June, 1800.

“as against that ship and her owners as good a claim as the person who actually supplied them, and, further, that he who advances money to the person who thus pays for the purpose of enabling him to pay stands in the same position as the person to whom the money is advanced.”¹² At out-ports such advances are usually made by the ship’s agents, acting either upon the general instructions or upon the specific authority of the owners. If, however, the advances are merely items in a general mercantile account, the ship’s agent has no right to sue on them as for necessities.¹³ At the home ports advances for necessities are frequently made by the ship’s husband, and in his case the same rule applies as in claims by the ship’s agent.¹⁴ The master is seldom in a position to make advances on his personal credit. The claim for necessities supplied may be either *in personam* or *in rem*.

Persons Liable for Necessaries: (a) The Owners.—The personal liability of the owners is based on contract made either directly with them or with their agents.¹⁵ In practice the contract is generally made with the ship’s agent, for whose obligations within the scope of his authority they are liable. The liability of the owners does not rest on the ground of ownership, but on their position as exercitors of the ship and in possession and control at the time when the necessities are ordered and as receiving the benefit of them.¹⁶ Thus a charterer in possession may be liable¹⁷; or a mortgagee in possession in so far as the necessities are required in order to make the ship available as a security.¹⁸ In this case, however, the master has no implied authority to bind the mortgagee, and his authority requires to be direct.¹⁹ Where the mortgagee is acting also in the interests of the owner, the latter is also liable *pro rata* on the ground of implied contract.²⁰ In the ordinary event the owner is not liable for necessities supplied before he has purchased or after he has sold the vessel,

¹² *Foong Tai & Co. v. Buchheister & Co.*, 1908 A.C. 458, Lord Atkinson, at 466.

¹³ *The “Moglieff,”* 1921, P. 236, Hill, J., at 244.

¹⁴ *Foong Tai & Co. v. Buchheister & Co.*, *supra*.

¹⁵ *Mitcheson v. Oliver*, 1855, 5 El. & Bl. 419, Parke, B., at 443; *Fyfe v. Harwood*, 1859, 21 D. 845.

¹⁶ *Miller & Co. v. Potter, Wilson & Co.*, 1875, 3 R. 105, Lord Gifford, at 112.

¹⁷ *North-Western Bank v. Bjornstrom*, 1866, 5 M. 24; *Benn. & Co. v. Porret*, 1868, 6 M. 577.

¹⁸ Bell, Comm. i., 521; *Maclaren v. Buik*, 1829, 7 S. 483.

¹⁹ *The “Troubadour,”* 1866, 1 Adm. & Ec. 302.

²⁰ *Clark v. Hine*, 1912, 2 S.L.T. 290.

but if a purchaser has entered possession of a ship before sale has been completed he is bound to relieve the seller of all claims for necessities furnished after he has taken possession.²¹ The opinion has been expressed that, where a ship's husband has ordered necessities while a sale is being negotiated, the seller may be liable to account to him for the price of the necessities, even if they are only used after the sale has been completed. On equitable grounds, however, such liability will not exist if the ship's husband is himself the purchaser.²² A trustee in bankruptcy may be liable for necessities if he is in fact the exercitor of the ship.²³ A trustee, however, does not incur liability merely from the fact of being entered on the register as owner, nor a mortgagee merely in virtue of his mortgage being registered.²⁴ The implied authority of the master is such that the owner may be liable where the necessities are ordered by a third party who has in fact no authority to act for him, as where they are ordered by the consignee of the cargo on the authority of the master, and the master draws a bill on the owner for the amount due.²⁵ Similarly, it has been held in England that where the owners have allowed other persons to act as owners they are liable for expenditure properly incurred by the master in the employment of the latter.¹ Where the title of the owner who has authorised the necessities is merely temporary and equitable, the real owner may be liable on the ground of recompense in so far as the necessities are *in rem versum*.² Similarly, the registered owner may be liable even if he is not in fact the exercitor of the ship if he has held himself out as owner and has adduced no evidence of transfer of the ship. He is then personally barred from repudiating liability.³

(b) **The Ship's Husband.**⁴—In the absence of express limitation of his mandate, the ship's husband may order necessities either in a home or foreign port, and the owners will be personally liable for the price.⁵ For such expenditure he may draw

²¹ *Inglis v. Lane & Co.*, 1833, 12 S. 67.

²² *Robertson v. Dennistoun*, 1865, 3 M. 829.

²³ *Mackessack & Son v. Molleson*, 1886, 13 R. 445.

²⁴ *Steele & Co. v. Dixon*, 1876, 3 R. 1003.

²⁵ *Stewart v. Hall*, 1813, 2 Dow, 29.

¹ *The "Ripon City"*, 1897, P. 226.

² *Brown & Co. v. Balfour*, 1826, 4 S. 401.

³ *Hay v. Cockburn's Trustees*, 1850, 12 D. 1298.

⁴ See also *supra*, p. 132.

⁵ *Hamiltons & Co. v. Landale*, 1860, 22 D. 1059.

bills of exchange on them, and their liability is not discharged by merely handing to him the sum due to him.⁶ In Scots law he has no authority to borrow money to pay for necessaries,⁷ but in England it has been held that he has a strictly limited power to do so only in so far as may be necessary to enable the ship to prosecute her voyage.⁸ Where he has made advances on his own credit for necessaries he may sue the co-owners individually for their own shares of the amount, and has the additional security of a lien over the freight. The lien, however, is contingent on freight being earned, and the remedy is in substance against the ship herself, and, accordingly, if he retains the advances out of the freight or subsequently recovers them from a purchaser of the ship, the latter has a right of relief against the seller.⁹ The personal liability of a ship's husband is that of an agent at common law.¹⁰ It is not clear, however, how far the principle of election applies as between him and the owners. It has been observed that the ordinary rule that in a claim by a third party, "if knowing the principal he elects to rely on the sole credit of the agent and takes his bill, he may thereby lose his remedy against the principal . . . hardly applies at all in the case of necessaries supplied to a ship," since the claim is primarily against the ship herself. Accordingly, the owner may be liable in such a case for obligations incurred either by the ship's husband or by the master acting within the scope of their authority.¹¹ In one case it was held that where the necessaries man elected to sue the ship's husband he was not entitled to recover his debt from the owners, but the case was exceptional in respect that the necessaries man had delayed suing the owners until they had already handed the sum due to the ship's husband and the latter had already become bankrupt. It was observed that the case involved no general principle.¹²

(c) **The Master.**¹³—In the absence of the owner or ship's husband the master has an implied mandate to order

⁶ Bell, Comm. i., 503; *Stewart v. Hall*, 1813, 2 Dow, 29.

⁷ Bell, Comm. i., 504.

⁸ *The "Faust"*, 1887, 6 Asp. M.L.C. 102, Lord Esher, M.R., at 128.

⁹ *Carswell & Son v. Finlay*, 1887, 14 R. 903, Lord Shand, at 910.

¹⁰ *Craig & Co. v. Blackater*, 1923 S.C. 472.

¹¹ *Cory Bros. v. M'Lean*, 1898, 6 S.L.T. 103, Lord Ordinary, at 104.

¹² *Carsewell v. Scott*, 1839, 1 D. 1215.

¹³ See also *supra*, p. 136.

necessaries either in a home or foreign port.¹⁴ He may draw or accept bills of exchange for the owners and may borrow money in foreign ports, but only for the purpose of necessities.¹⁵ The liability, however, of the owners on bills of exchange drawn on them by the master is strictly limited to the case of necessities alone,¹⁶ and they are not liable for exchange or re-exchange, either as acceptors failing to accept or as virtual drawers, on bills drawn on them by the master for general disbursements made by the agent of charterers of the vessel.¹⁷ Where it was not clear whether money borrowed by the master was to be applied for necessities alone opinion was reserved as to whether the lender could proceed against the owners.¹⁸ As in the case of the ship's husband, where the master has made advances on his own credit for necessities, he may sue the co-owners individually for their own share of the amount due, and has in addition a lien over the freight and a maritime lien for disbursements and liabilities. The master may grant bonds of bottomry or respondentia for necessities.¹⁹ The personal liability of the master is exceptional in respect that, although acting for known and registered principals, he is yet personally liable for the price of necessities ordered by him, unless it appears that credit has been given to the owners alone²⁰; nor is his liability limited to the amount of any sum which he may have received for the purpose from the owners.²¹ He is personally liable on bonds or bills of exchange drawn by him unless they contain an express stipulation that the owners alone are liable.²² On his own obligations his liability is joint and several with that of the owners, but the principle of election applies where he has been sued to judgment.²³ No liability attaches to him for contracts made by the owners alone.

(d) **The Ship's Agent.**—At foreign ports necessities are in practice generally obtained on the credit of the ship's

¹⁴ Bell, Comm. i., 507.

¹⁵ Bell, Comm. i., 528.

¹⁶ *London Joint Stock Bank v. Stewart & Co.*, 1859, 21 D. 1327.

¹⁷ *Strickland & Co. v. Neilson & MacIntosh*, 1869, 7 M. 400.

¹⁸ *Drain & Co. v. Scott*, 1864, 3 M. 114.

¹⁹ Bell, Comm. i., 530.

²⁰ *Cory Bros. v. M'Lean*, 1898, 6 S.L.T. 103.

²¹ Bell, Comm. i., 522-525.

²² Bell, Comm. i., 530.

²³ *Meier & Co. v. Kuchenmeister*, 1881, 8 R. 612, Lord Justice-Clerk, at 644; Bell, Prin., sec. 450, note (v), see *supra*, p. 140.

agent. His instructions may be of a general character, or they may contain specific powers to order necessities. His liability, therefore, and that of the owners is therefore a question of construction of the terms of his mandate.

Circumstances in which Proceedings in rem may be Taken.—There is no maritime lien for necessities supplied either in a home or in a foreign port. The maritime lien which was formerly admitted for necessities supplied in a foreign port²⁴ is now no longer recognised. It has been expressly negatived in England,²⁵ and the law of Scotland has now been brought into conformity.²⁶ It may be noted, however, that in certain circumstances a necessities man may exercise what is in effect a maritime lien for necessities. At many foreign ports it is an established custom for coal merchants to take a draft on the owners from the master, on which the latter is personally liable. By threatening proceedings against the master they may thus force him to exercise his maritime lien for disbursements, and so may indirectly obtain the security of the ship.²⁷ The absence, however, of a maritime lien does not necessarily preclude the right of proceeding *in rem*, and it has been observed that in the case of necessities the claim is primarily against the ship herself.²⁸

(a) Where Furnishings are Supplied on the Credit of the Ship.—In a home port the owners of the ship are presumably known, and the furnishings are supplied on their credit. In a foreign port, however, the owners are generally unknown, and, except where the supplier of necessities relies on the personal credit of the agent on the spot, he generally relies on the apparent authority of the master to represent the ship, and the credit is, in fact, that of the ship.²⁹ Liability may thus be brought home to the owners of the ship, although the furnishings were not in fact made on their credit.

(b) Where the Ship is in the Possession of a Shipwright.—Where the necessities take the form of repairs it is immaterial whether the debt is incurred in a home or in a foreign port, since in either event the shipwright may proceed *in rem* in virtue of his possessory lien, under the limitation that in the

²⁴ *Hamilton v. Wood*, 1788, M. 6269.

²⁵ *The "Rio Tinto"*, 1883, 9 A.C. 357.

²⁶ *Constant v. Christensen*, 1912 S.C. 1371.

²⁷ *The "Ripon City"*, 1897, P. 226, Gorell Barnes, J., at 231.

²⁸ *Cory Bros. v. M'Lean*, 1898, 6 S.L.T. 103, Lord Ordinary, at 104.

²⁹ *The "Rio Tinto"*, 1883, 9 App.Cas. 357, at 364.

case of a ship possessory liens are less favoured in law than in the case of other subjects.¹ The possessory lien of the shipwright is substantially similar in character to that of a tradesman at common law for repairs. Its enforcement, however, involving as it necessarily does the detention of a ship, is essentially a process *in rem*, for which formerly the concurrence of the Judge Admiral was required. The procedure usually followed is an action of declarator of lien with conclusions for judicial sale of the ship,² or a petitory action with arrestment of the ship with conclusions for judicial sale.³ The lien is not lost by arrestment of the vessel in another process, since the Court will exercise its equitable powers to preserve the existing rights of the shipwright. If, however, the lien is voluntarily relinquished, the remedy of the shipwright then becomes merely personal.⁴ For the purposes of the lien possession of the ship is entirely a question of fact, and commences when the shipwright has taken the vessel "into his dock or entirely within his own possession."⁵ It has been stated that no lien exists for repairs executed "in open harbour or in a roadstead,"⁶ but while at least *prima facie* this is so, opinion has been reserved whether "even then there may not be circumstances indicating such a transmission of the ship, such as handing over of the ship to the workmen, that there may arise a lien for repairs."⁷ Where repairs were commenced in a shipwright's yard and continued in a public dock, it has been held that possession remained with the shipwright. In this case the Court appears to have been influenced by the fact that the shipwright retained a representative on board by day and night, and that the ship remained attached by hawsers to his premises.⁸ It is immaterial whether the master and crew remain on board the vessel or not, and whether the repairs have actually been completed.⁹ As against the shipwright, the engineer who supplies the engines may have possession where the ship is situated in a public dock, but where it is expressly stipulated in the contract that the

¹ Bell, Comm. ii., 97.

² *Ross & Duncan v. Baxter & Co.*, 1885, 13 R. 185.

³ *Elias v. Black*, 1856, 18 D. 1225.

⁴ *Gavin & Son v. Sword*, 1835, 14 S. 187.

⁵ Bell, Comm. ii., 98.

⁶ Bell, Comm. ii., 98.

⁷ *Barr & Shearer v. Cooper*, 1875, 2 R. (H.L.) 14, Lord Cairns, L.C., at 18.

⁸ *Barr & Shearer v. Cooper*, *supra*.

⁹ *The "Tergeste"*, 1903, P. 26.

ship shall remain in charge of the shipwright, and that he shall retain a representative on board during the whole period of the work, it has been held that possession has not passed to the engineers.¹⁰ The general rule that a lien must be surrendered on adequate security being given to the holder applies with special force in the case of a subject of such commercial importance as a ship.¹¹ The lien does not cover charges for dock hire or slip dues after delivery of the vessel ought to have been taken by the owner.¹² It is as yet undecided whether it covers the expenses of an action regarding it, but the opinion has been expressed that such expenses as are still illiquidate are not covered.¹³

(c) **Where a Bottomry Bond has been Granted.**—Where an instrument of bottomry or respondentia has been granted in his favour the supplies of necessities may proceed *in rem* in virtue of his maritime lien therefor. In this case the remedy is limited by the nature of the instrument on which it is founded. Thus, if the ship fails to reach her destination the instrument is void and the remedy falls with it.¹⁴

(d) **Where the Master has Incurred Personal Liability.**—The master has a statutory maritime lien for disbursements made or liabilities incurred for necessities, which, so far as the case permits, is the same as that which he has for the recovery of his wages.¹⁵

Claims for the Stowing or Discharge of Cargoes or the Trimming of Coal.—In claims for work done in the stowing and discharge of cargoes or the trimming of coal in ships none of whose owners reside in the United Kingdom, Courts of Admiralty jurisdiction in Scotland have the same jurisdiction for the purpose of enforcing the claim as if the claim were a claim for necessities supplied to the ship.¹⁶ Owing to the power of arresting vessels *ad fundandam jurisdictionem*, this provision is of little practical importance in Scotland, but may be of value if for any reason arrestment *ad fundandam jurisdictionem* is impracticable and it is necessary to proceed directly *in rem*.

¹⁰ *Ross & Duncan v. Baxter & Co.*, 1885, 13 R. 185.

¹¹ *Mackenzie v. Steam Herring Fleet, Ltd.*, 1903, 10 S.L.T. 734.

¹² *Alex. Stephen & Sons v. Swayne*, 1861, 24 D. 158.

¹³ *Garscadden v. Ardrossan Dry Dock Co., Ltd.*, 1910 S.C. 178.

¹⁴ Cf. *The "Elpis"*, 1872, 4 Adm. & Ec. 1.

¹⁵ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 167 (2), see p. 283.

¹⁶ Merchant Shipping (Stevedores and Trimmers) Act, 1911 (1 & 2 Geo. V. c. 41), secs. 1-4.

CHAPTER IX.

WAGES AND MASTER'S DISBURSEMENTS.

Claims at Common Law.—Claims for seamen's wages may be brought either under the common law or the Admiralty jurisdiction. At common law a claim may be made in any case where a contract of service of any kind, whether verbal or written, can be proved.¹ In England the law is similar.² In the absence of express stipulation wages at the customary rate may be claimed.³ It has been held that such contracts may be enforced in favour of the seaman, even if their terms are in direct contradiction to those of the ship's articles which the seaman has signed. Thus, where a seaman had been engaged at a port of call on terms which were inconsistent with the ship's articles, the agreement was held to supersede the ship's articles notwithstanding that the latter had been signed by the seaman.⁴ At common law, however, no maritime lien arises. Moreover, except in the case of certain small vessels engaged in the coasting trade, it is now compulsory to enter an agreement of service in statutory form, known as the ship's articles, with all seamen carried to sea.⁵ This agreement embodies the mariner's contract of Admiralty law, and carries with it the privilege of a maritime lien, and for this reason, where such an agreement has been made, proceedings *in rem* may be adopted. Where, however, a seaman is engaged for duties in harbour, or for any reason a special contract of service has been entered, it is uncertain whether a maritime lien arises, and proceedings at common law may therefore require to be taken.

Claims in Admiralty.—In questions arising on any agreement which embodies the mariner's contract there is an original jurisdiction in Admiralty. In this contract in its earliest form only two stipulations were necessary—on the part of the ship-

¹ *Pennell v. M'Intyre*, 1845, 17 Scot. Jur. 567; *Thomson v. Hart*, 1890, 18 R. (J.) 3.

² *In re The "Great Eastern" S.S. Co.*, 1885, 5 Asp. M.L.C. 511.

³ Bell, Comm. i., 511.

⁴ *Henderson v. Burns*, 1832, 10 S. 467.

⁵ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), secs. 113-116.

owner a description of the intended voyage, and on the part of the seaman a statement of the rate of wages which he was prepared to accept.⁶ The contract is now embodied in the statutory agreement of service, and confers on the seaman the privileges of a maritime lien. In England there is also a jurisdiction in Admiralty over special contracts for wages, but this is entirely statutory,⁷ and whether such special contracts confer a maritime lien is at least uncertain.⁸

Statutory Jurisdiction.—Jurisdiction in claims for wages is in some respects modified by the provisions of the Merchant Shipping Act. Thus, a distinction is drawn between claims which do not exceed £50 and those which exceed that value. In the former the seaman “or a person duly authorised on his behalf” may sue in a Court of summary jurisdiction, and the order made by the Court in the matter is “final.” Jurisdiction is assigned to the Court “in or near the place at which his service has terminated or at which any person on whom the claim is made is or resides.”⁹ The procedure to be followed is, in the Sheriff Court, that of a summary cause, and in the other Courts the ordinary procedure. Claims not exceeding £50 are expressly barred in “any superior Court of record” and “as an Admiralty proceeding in any Court having Admiralty jurisdiction” except in the following cases:—

- “(1) Where the owner of the ship is adjudged bankrupt;
“or
- “(2) Where the ship is under arrest or is sold by the
“authority of any such Court as aforesaid; or
- “(3) Where a Court of summary jurisdiction acting under
“the authority of this Act refers the claim to any
“such Court; or
- “(4) Where neither the owner nor the master of the ship
“is or resides within 20 miles of the place where the
“seaman . . . is discharged or put ashore.”¹⁰

Subject to these limitations, the Admiralty jurisdiction remains as formerly. The purpose of these special provisions is to provide a cheap and expeditious remedy in cases where, owing

⁶ The “*Minerva*,” 1825, 1 Hagg. Adm. 347, Lord Stowell, at 353.

⁷ Admiralty Court Act, 1861 (24 Vict. c. 10), sec. 10.

⁸ The “*British Trade*,” 1924, P. 104.

⁹ Sec. 164.

¹⁰ Sec. 165.

to the delay, inconvenience, and expense which would be occasioned and to the inconsiderable amount of the claim, proceedings *in rem* would be inappropriate. The exceptions enumerated provide for cases where summary proceedings would be difficult or impracticable, or where for any reason a decision of a superior Court appears to be called for.¹¹ At the same time, provision is made for preserving, as far as may be necessary, the security of the ship where summary proceedings are taken. Thus, if the sum due is not paid at the time and in the manner prescribed in the order, the Court, in addition to any other powers which they may have, may "direct the amount remaining unpaid to be levied "by distress or poinding and sale of the ship, her tackle, furniture, and apparel."¹² In addition, the "complaint or "action" may contain a prayer for warrant to arrest on the dependence,¹³ and the "decree" following thereon may contain warrant for arrestment, poinding, and imprisonment in default of payment.¹⁴ The practical advantages of proceeding *in rem* are thus preserved. Although the order pronounced by the Court is "final," it may be appealed on the ground of "corruption and malice" on the part of the Court.¹⁵ Such an appeal, however, will not be entertained unless a case of gross miscarriage of justice is made out.¹⁶ A place of occasional business is not a place of residence.¹⁷ The provision for reference of claims to a higher Court is applicable in cases where difficult questions of law arise.¹⁸ It is probable that the expression "a person duly authorised on his behalf" is not intended to apply to the personal representative of the seaman.¹⁹

Persons Entitled to Recover Wages.—The persons entitled to recover wages are the master and crew of the vessel in which they have been earned. So far as the case permits, the master has "the same rights, liens, and "remedies for the recovery of his wages" as a seaman has under the Merchant Shipping Act or by any law or

¹¹ *Hollingworth v. Palmer*, 1849, 4 Ex. 267.

¹² Sec. 693.

¹³ Sec. 704.

¹⁴ Sec. 707.

¹⁵ Sec. 709.

¹⁶ *Sinclair v. Spence*, 1883, 10 R. 1077.

¹⁷ *The "Blakeney"*, 1859, Swa. 428.

¹⁸ *The "Olympic"*, 1913, P. (C.A.) 92.

¹⁹ *Hollingworth v. Palmer*, 1849, 4 Ex. 267.

custom.²⁰ The term "seaman" includes "every person" (except masters, pilots, and apprentices duly indentured and "registered) employed or engaged in any capacity on board "any ship."²¹ It thus includes all the certificated officers under the master, and these have, therefore, like the ordinary seamen, a remedy against the master and the ship as well as against the owners. The maritime lien of the seaman transmits to third parties who pay his wages, and these, therefore, acquire a right to sue *in rem*, provided always that the payment has been made on the credit of the ship. Opinions have been expressed that the lien transmits even in cases where there has been no formal assignation. Where, however, the payment has been made on the credit of the owner, since the obligation is then merely personal, no lien is transmitted and no right to sue is acquired.²² In England, on the contrary, it has been held that the lien does not transmit to third parties unless the payment has been made under authority of the Court.²³ Foreign seamen may sue for wages earned in foreign ships, provided that jurisdiction has been properly established.²⁴ An alien enemy has in general no title to sue in the Courts of this country, but it has been held in England that he may do so for wages if the vessel in which the wages have been earned has come to this country under a British licence.²⁵ In certain circumstances the Board of Trade may recover seamen's wages. The wages of a seaman dying in the course of a voyage may be recovered by the Board in the same manner in which the seaman himself could have recovered them, and the master is under a statutory obligation to account to the Board of Trade for the wages and other property of seamen dying in the course of a voyage.²⁶ This obligation is, however, discharged where the death occurs on or immediately after the loss of the ship, since it is of such a nature that it can only be implemented if the ship completes her voyage or, in any event, if she reaches a port of call.¹ Similarly, the wages of a seaman lost with the ship to which he belongs may be recovered by the Board of Trade in the

²⁰ Sec. 167 (1).

²¹ Sec. 742.

²² *Clark v. Bowring & Co.*, 1908 S.C. 1168.

²³ *The "Petone"*, 1917, P. 198.

²⁴ *Bernard v. Connor*, F.C. 11th June, 1811.

²⁵ *The "Vrow Mina"*, 1813, 1 Dods, 234.

²⁶ Secs. 169-171.

¹ *Stephen v. Duncan*, 1862, 1 M. 146.

same manner in which the seaman himself could have recovered them.² The policy of the Legislature is that no seaman, who has made an agreement of service, shall be lost sight of, and for this reason a general register of all British seamen is kept by the Board of Trade. Accordingly, in the absence of proof to the contrary, there is a statutory presumption that a seaman, whose name appears on the list of the crew of a ship which has been lost, was on board at the time of its loss,³ and it has been held that this presumption is not rebutted by the receipt by the agents of the owners of a telegram signed by the master from the last port of call that the payment of the seaman's allotment note should be stopped.⁴

Right to Sue for Wages Abroad.—When the voyage or engagement is to terminate in the United Kingdom, British seamen are not allowed to sue abroad for their wages, except in cases of serious ill-treatment or where they have been discharged with such sanction as is required by the Merchant Shipping Act.⁵ It has been pointed out that were the rule otherwise the result might be either that the ship would be detained during the hearing of such claims and the voyage in consequence unduly delayed, or that the proceedings would require to go on in the absence of the ship and without material witnesses.⁶

Conjunction of Actions.—Proceedings may be taken either *in personam* on the personal obligation or *in rem* to enforce the maritime lien which exists in virtue of the mariner's contract. When proceedings are taken *in rem* it has been held in England that a joint action for wages is competent, since the claim is founded primarily not on contract but on service to the ship,⁷ and it is probable that in Scotland the decision would be similar. The entire crew may in such a case sue in one action, the master alone excepted, since the nature of his services is essentially different, and the obligation of service of the crew is taken to him directly.⁸ In personal claims the question of right to sue jointly is still unsettled. Although the agreement of service of the whole ship's company is contained in a single document,

² Sec. 174 (i) 1 (2).

³ Sec. 174 (3).

⁴ *Neil v. Owners of s.s. "Ibis,"* 1920, 36 Sh.Ct.Rep. 64.

⁵ Sec. 166 (1).

⁶ *Alexander v. Little & Co.*, 1906, 8 F. 641, Lord President, at 645.

⁷ *The "Maréchal Suchet,"* 1896, P. 233.

⁸ Bell, Comm. i., 509.

it constitutes in law an agreement with each seaman individually, and his rights and obligations under it are several and not joint.⁹ In England, however, no objection has been taken to the competency of a joint personal action by members of a crew which concluded, *inter alia*, for payment of wages.¹⁰ The question of the right to sue jointly may be of consequence as determining the value of the claim, and so the procedure which is applicable. It is probable that a joint action may be brought, in any event if proceedings *in rem* are taken in the form applicable to claims exceeding £50, even if none of the individual claims exceed that amount, provided that the *cumulo* claim does exceed it.¹¹

Liability for Wages.—Liability for wages may rest on the owners, on the master, or on the ship itself. The owner is liable as employer of the seaman. The master also incurs personal liability, since the agreement of service is within the scope of his authority and it is made directly with him.¹² He is thus in a dual position in respect that, in addition to his title to sue for his own wages, he has a liability to be sued for those of the crew. The ship is liable in virtue of the service rendered to her, and a maritime lien attaches to the last fragment independently of any personal obligation of the owner.¹³

Limitation of Actions for Wages.—As a common law claim a claim for seaman's wages would be subject to the triennial prescription. In England, however, by an Act which preceded the Union, and is therefore not directly applicable to Scotland, a limitation of six years is expressly applied to claims for seamen's wages.¹⁴ Considerations of equity and uniformity would point to a similar limitation being observed in Scotland. Although it might operate unfavourably to persons to whom the ship had passed after the right to claim had accrued, it would only be consistent with the peculiarly benevolent attitude which maritime law adopts towards seamen.¹⁵ In Scotland there is no express decision, but in view of the fact that the claim is in Admiralty, and of the observations in the case

⁹ *Frazer v. Hutton*, 1857, 2 C.B. (N.S.) 512.

¹⁰ *Caine v. Palace S.S. Co.*, 1907, 1 K.B. 670.

¹¹ *Campbell v. Train*, 1910 S.C. 147.

¹² *The "Salacia"*, 1862, 32 L.J. Adm. 41.

¹³ *The "Castlegate"*, 1893 A.C. 38, Lord Watson, at 52.

¹⁴ 4 Anne c. 16, secs. 17-19.

¹⁵ Bell, Comm. i., 513.

of *Currie v. M'Knight*,¹⁶ it is thought that the longer prescription would be maintained. As prolonged absence of seamen from the United Kingdom is now uncommon, the importance of longer period is less than formerly. In the case of summary proceedings in the United Kingdom the proceedings require to be commenced within six months after the cause of complaint arises, or if during that period both or either of the parties to the proceedings happen to be absent from the United Kingdom "within six months after they both first happen to arrive or to be at one time within the United Kingdom."¹⁷

Exemption of Wages from Arrestment.—The wages of seamen are not "subject to attachment or arrestment from any Court."¹⁸ It is reasonable to assume that this provision applies to seamen employed "on board any ship" as defined in the interpretation clause, and that the provisions of sec. 260-261, which confine the application of Part II. of the Act, in which the provision is included to "seagoing ships" unless the context or "subject-matter requires a different application" are here inapplicable. It has been held that this immunity extends also to the fund *in medio* where the sum due for wages has been consigned in Court and an action of multipointing raised.¹⁹ The arrestment of wages, however, is not a legal wrong to the effect of involving the arrester in liability for damages therefor. Where two arrestments were laid on a seaman's wages, and one arrester only was sued for damages, the opinion was expressed that a plea of all parties not called was well founded.²⁰

Claims for Wages Earned in Foreign Ships: Plea of *forum non conveniens*.—Claims for wages earned in foreign ships are competent in Admiralty provided jurisdiction has been validly established,²¹ and the terms of the Merchant Shipping Acts are sufficiently wide to be applicable to such claims. At the same time the exercise of jurisdiction over foreigners is discretionary, and the plea of *forum non conveniens* may on occasion be upheld, more particularly in claims *in rem*, if the circumstances are such as to warrant it. It is obviously a serious

¹⁶ 1897, 24 R. (H.L.) 1.

¹⁷ Sec. 683.

¹⁸ Sec. 163 (1) (a).

¹⁹ *Turbine Steamers, Ltd. v. M'Laughlin*, 1922, 39 Sh.Ct.Rep. 22.

²⁰ *M'Laughlin v. Dixon, Ltd.*, 1923, 40 Sh.Ct.Rep. 349.

²¹ *Bernard v. Connar*, F.C. 11th June, 1811.

inconvenience to interrupt the course of a voyage for a trifling claim for wages which may on investigation prove to be unfounded, and, moreover, in a *forum* where the master and owner may be unknown and access to caution difficult. For this reason British seamen are forbidden to sue abroad for wages except in certain specified cases.²² Moreover, in claims for wages consular officers have in many cases themselves power to adjudicate, and, accordingly, the claim, if entertained, should be intimated to the Consul of the State to which the vessel belongs. Such intimation is compulsory in England in the case of actions *in rem*.²³ In England the practice is that, if the Consul protests against the exercise of jurisdiction with reasons stated, the Court will investigate these before entertaining the action, but if he merely protests without stating reasons the Court will entertain the action in spite of the objection.²⁴ If the Consul has advanced money to the seaman to enable him to sue, the Court will order it to be repaid out of the sum recovered.²⁵ It is probable that a plea of *forum non conveniens* will be more readily sustained in claims by the master than in claims by the crew of a foreign vessel, since the master is in a special relationship to the owners, and can in general perfectly conveniently wait until the vessel has returned to its home port.¹ In personal claims for wages earned in foreign vessels the law of the flag is applied.² The Merchant Shipping Act expressly provides where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, that in the absence of direct contrary provision in the Act the case shall be governed by the law of the port where the ship is registered.³ In proceedings *in rem*, the question being one not of contract but of remedy, the *lex fori* is applied.⁴

Seaman.—A seaman is a person who is by vocation a seafaring man, and is at the moment when the question of his identity arises engaged in his duties as such.⁵ For the purposes of the Merchant Shipping Act the term includes, unless the context otherwise requires, “every person (except master,

²² Sec. 166 (11).

²³ Rules of the Supreme Court, Order 5, rule 16.

²⁴ *The “Nina,”* 1867, 2 P.C. 38.

²⁵ *The “Julina,”* 1876, 35 L.T. 410.

¹ *The “Herzogin Marie,”* 1861, Lush. 292.

² *The “Johannes Cristoph,”* 1852, 2 Spinks, 93.

³ Sec. 265.

⁴ *The “Tagus,”* 1903, P. 44.

⁵ *Macbeth & Co. v. Chislett*, 1910 A.C. 220, Lord Loreburn, L.C., at 223.

“pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship.”⁶ The following have been held, either in law or under statutory definition, to be seamen:—A storekeeper in charge of a vessel lying in harbour⁷; a person engaged in salving a wreck⁸; a rigger, *i.e.*, a person temporarily employed to navigate a new vessel either on its acceptance trials or to the port where it is to be delivered to its owner⁹; a person employed on a vessel trading partly on a canal and partly on an estuary.¹⁰ It has been held that a person merely employed to assist in warping a vessel from one berth in a dock to another is not a seaman.¹¹ Opinion has been expressed that a stevedore is a seaman,¹² and that a person employed on a vessel plying only on canals is not.¹³ Opinion has been reserved whether the following are seamen:—A person present on a ship on probation for the purpose of engagement as a seaman, but with whom no verbal or written agreement of service has yet been entered,¹⁴ a person employed on a vessel plying solely on lakes.¹⁵

Ship.—The meaning of the term “ship” is a question of fact.¹⁶ For the purposes of the Merchant Shipping Act, 1894, it includes “every description of vessel used in navigation not propelled by oars.”¹⁷ By the Merchant Shipping Act, 1921,¹⁸ the term is extended to mean, in those portions of the Act which relate to registration and limitation of liability, “every description of lighter, barge, or like vessel used in navigation in Great Britain, however propelled,” provided that such vessels used exclusively in non-tidal waters shall not be deemed to be used in navigation.¹⁹ Regarding that portion of the Merchant Shipping Act which regulates claims for seamen’s wages, it has been observed that “the second part of the Act contains

⁶ Sec. 742.

⁷ *Thomson v. Hart*, 1890, 18 R. (J.) 3.

⁸ *Lumsden v. Garscadden*, 1898, 14 Sh.Ct.Rep. 36.

⁹ *Smith v. Napier & Sons, Ltd.*, 1899, 15 Sh.Ct.Rep. 88.

¹⁰ *Thomson v. Ross & Mitchell*, 1896, 12 Sh.Ct.Rep. 107.

¹¹ *Macbeth & Co. v. Chislett*, 1910 A.C. 220.

¹² *Reg. v. Judge of the City of London Court*, 1890, 25 Q.B.D. 339, Lord Coleridge, L.C.J., at 342.

¹³ *Oakes v. Merkland Iron Co., Ltd.*, 1884, 11 R. 579, Lord Justice-Clerk, at 583.

¹⁴ *Thomson v. Izat*, 1831, 9 S. 598.

¹⁵ *Oakes v. Merkland Iron Co., Ltd.*, *supra*, Lord Justice-Clerk, at 583.

¹⁶ *The “Mac,”* 1862, 7 P.D. 126; *Salt Union v. Wood*, 1893, 1 Q.B. 370.

¹⁷ Sec. 742.

¹⁸ 11 & 12 Geo. V. c. 28.

¹⁹ Sec. 1.

“a variety of provisions. Some of them are expressly applicable only to British ships, and some are applicable also to foreign ships; but there is a third class of provisions which are quite irrespective of the nationality of the ships or seamen.”²⁰

Wages.—For the purposes of the Merchant Shipping Act, 1894, the term “wages” includes, unless the context otherwise requires, “emoluments.”²¹ Wages have been held to include a victualling allowance²²; slops in lieu of wages²³; and subsistence money from the time the seaman leaves the ship till his return home.²⁴ Opinion has been expressed that they do not include such maintenance as the owner may be liable for under the Merchant Shipping Acts.²⁵ Emoluments include a bonus.¹

Agreement of Service.—An agreement of service in prescribed form, known as the ships’ articles, in which the mariner’s contract for wages is embodied, requires to be made by every seaman carried to sea, except in the case of ships of less than 80 tons registered tonnage exclusively engaged in the coasting trade.² An agreement for service in two or more ships belonging to the same owner may be made with the owner himself, but in all other cases it requires to be made with the master.³ It may be made for a voyage or for a series of voyages, in which case it is known as a running agreement.⁴ The agreement, which requires to be in writing but does not require a stamp,⁵ forms conclusive evidence against the master or owner in any dispute regarding wages, but, except in the prescribed form, it is not admissible in evidence in their favour in any civil proceedings.⁶ In favour of the seaman, however, it may be proved in any form,⁷ and without production or notice of production.⁸ It is an accepted maxim that seamen are “the

²⁰ *Hart v. Alexander*, 1898, 1 F. (J.) 27, Lord Moncreiff, at 30.

²¹ Sec. 742.

²² *The “Tergeste,”* 1903, P. 26.

²³ *The “Feronia,”* 1868, 2 Adm. & Ec. 65.

²⁴ *The “Immacolata Concezione,”* 1883, 9 P.D. 37.

²⁵ *Palace Shipping Co., Ltd. v. Caine*, 1907 A.C. 386, Lord Atkinson, at 399.

¹ *Wood v. Gow, Harrison & Co.*, 1920, 36 Sh.Ct.Rep. 204; *Shelford v. Mosey*, 1917, 1 K.B. 154.

² Secs. 113-116.

³ Sec. 116 (3).

⁴ Sec. 115.

⁵ Sec. 721.

⁶ Sec. 720 (4).

⁷ *Ibid.*

⁸ Sec. 123.

"favourites of the law owing to their own imbecility,"⁹ and, accordingly, in the construction of contracts of service the law adopts a peculiarly benevolent attitude towards them¹⁰ which is altogether independent of statutory provision.¹¹ Thus, where any doubt arises regarding the construction of a contract of service, the seaman is entitled to its benefit.¹² The Merchant Shipping Act expressly provides that in any dispute between an owner or master of a ship and a seaman incidental to their relation as such the Court may rescind any contract between them upon such terms as it thinks just, and that this power shall be in addition to any other jurisdiction which the Court may otherwise exercise.¹³ The Act further provides that "a seaman shall not by any agreement forfeit his lien on the ship or be deprived of any remedy for the recovery of his wages to which in the absence of the agreement he would be entitled, and shall not by any agreement abandon his right to wages in case of the loss of the ship . . . and every stipulation in any agreement inconsistent with any provision of this Act shall be void."¹⁴ It is immaterial whether the abandonment is for a valuable consideration or not.¹⁵

Right to Wages: (a) Beginning.—A seaman's right to wages begins "either at the time when he commences work or at the time specified in the agreement for his commencement of work or presence on board, whichever first happens."¹⁶

(b) Termination.—The termination of the right depends on circumstances. Thus it may terminate—

(1) *By Performance of Contract.*—It terminates by discharge of the seaman on the conclusion of the period of service named in the agreement, which is usually that of a voyage, but it is perfectly competent for a seaman to contract for wages by the month or other fixed period of time or by a share in the profits of a voyage or run,¹⁷ or to enter running agreements to serve in any one or more ships belonging to the same owner.¹⁸

⁹ *The "Minerva,"* 1825, 1 Hagg. Adm. 347, Lord Stowell, at 358.

¹⁰ *Horlock v. Beale*, 1916, 1 A.C. 486, Lord Loreburn, at 492.

¹¹ *Palace Shipping Co., Ltd. v. Caine*, 1907 A.C. 386, Lord Loreburn, L.C., at 391.

¹² *The "Nonpareil,"* 1864, Br. & L.²355.

¹³ Sec. 168.

¹⁴ Sec. 159(i).

¹⁵ *The "Rosario,"* 1876, 2 P.D. 41.

¹⁶ Sec. 155.

¹⁷ Sec. 234.

¹⁸ Sec. 116 (4).

He cannot be discharged before the termination of the agreement unless he voluntarily withdraws from it. On discharge the seaman is entitled to a certificate of discharge in a form approved by the Board of Trade, and a certificated officer to a return of his certificate of competency.¹⁹ The agreement is indivisible, and no right to wages accrues until its termination in due course. For this reason the principle that a servant may recover wages on a *quantum meruit* basis, if his service has terminated without his fault before the expiry of the agreement, is not recognised in the mariner's contract. If, however, the ship is sold in the course of the voyage, and the seaman continues to serve under the authorised agent of the new owner, a new contract of service is implied under which he can recover wages *pro rata* until the contract is dissolved by mutual consent.²⁰

(2) *By Premature Termination of Service.*—The principle of the indivisibility of the contract of service is now considerably modified both by statute and by decision. Thus, "when the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship," he is entitled to wages up to the date of such termination.²¹ The term "wreck" as here used applies to the case of a vessel temporarily rendered unseaworthy by collision.²² The term "loss" means physical loss, and not such loss as occurs when a ship is interned by an enemy power. Loss, however, does not necessarily imply the actual foundering of the ship, but merely that it is reduced to such a state that it is impracticable to repair it.²³ The service terminates on the final act of abandonment of the vessel,¹ and any services rendered beyond that period are in the nature of agency, and will be rewarded as such.² A mere order of abandonment, however, does not necessarily terminate the service if it is subsequently rescinded and a return made to the ship.³ Termination of the service does not necessarily end the contract of service, as where a vessel is merely temporarily rendered un-

¹⁹ Sec. 128; Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), sec. 31.

²⁰ *Robins v. Power*, 1858, 4 C.B. (N.S.) 778.

²¹ Sec. 158.

²² *The "Olympic"*, 1913, P. (C.A.) 92.

²³ *Horlock v. Beale*, 1916, 1 A.C. 486.

¹ *Lord Advocate v. Grant*, 1874, 1 R. 44.

² *M'Lagan v. Chunie*, 1848, 10 D. 847.

³ *The "Portreath"*, 1923, P. 155.

seaworthy and the service is resumed after repairs.⁴ In certain events a presumption of loss arises.⁵ A similar rule applies where the service terminates through the seaman being left ashore anywhere abroad under a certificate of illness,⁶ or through his volunteering into the Navy.⁷ Similarly, "if a seaman, having signed an agreement, is discharged otherwise than in accordance with the terms thereof before the commencement of the voyage or before one month's wages are earned without fault on his part justifying a discharge and without his consent," he is entitled to any wages he may have earned, and in addition may recover compensation for the damage caused to him by the discharge, not exceeding one month's wages, in the same manner as if it were wages duly earned.⁸ This provision applies only where there is a signed agreement, and is without prejudice to the seaman's right to compensation at common law for wrongful dismissal under other circumstances. It is necessary, however, to distinguish between a claim for wages earned under contract and a claim for damages for breach of contract.⁹ The meaning of the term "voyage" has never been defined, and is not capable of definition, since it is a question of fact depending on a variety of considerations. The agreement is usually made for a round voyage to a foreign port or series of ports and thence back to a home port. The voyage is that of the ship and not of the cargo.¹⁰ No express provision is made for the case of termination of service through the death of the seaman, and since the contract is indivisible and has not been performed, it would appear that no right to wages accrues. The Act, however, appears to contemplate wages being due in such a case.¹¹ Bell states that he is entitled to wages for the outward voyage if he dies during the outward voyage, and to the whole if he dies during the homeward voyage, and that when the engagement is by the month they are due only to the time of death. It is, however, in each case a question of construction of the actual terms of the agreement.¹²

⁴ *The "Olympic," supra.*

⁵ Sec. 174.

⁶ Sec. 158.

⁷ Secs. 195-7.

⁸ Sec. 162.

⁹ *The "British Trade,"* 1924, P. 104, the President, at 110.

¹⁰ *The "Scarsdale,"* 1907 A.C. 373, Lord Loreburn, L.C., at 378.

¹¹ Sec. 169 (3) (c).

¹² Bell, *Comm. i.*, 514; cf. *Button v. Thompson*, 1869, 4 C.P. 330, Brett, J., at 347; *Beale v. Thompson*, 1803, 3 B. & P. 405.

(3) *By Impossibility of Performance of Contract.*—Generally, in accordance with the common law principle, a contract of service terminates and wages up to the date of termination become due as soon as further performance becomes impossible.¹³ Thus, if a seaman is sent home as a witness in a judicial proceeding, the contract of service is terminated owing to the intervention of the State, and wages are due up to date.¹⁴ Performance also becomes impossible, and the contract is terminated if the vessel is interned by an enemy power, but mere temporary detention does not amount to internment.¹⁵ The seizure of a ship is an equivocal act, and the question whether it is merely a temporary detention or a permanent capture is one of the intention of the captor. In the former case the contract continues and the wages continue to run during the period of detention; in the latter the right to them terminates at the date of the seizure.¹⁶ No right to wages accrues for any time during which a seaman unlawfully refuses or neglects to work or is lawfully imprisoned,¹⁷ or during illness caused by his own wilful act or default.¹⁸

Loss of Right to Wages.—Although the maxim that “freight is the mother of wages” is no longer recognised, a seaman’s right to wages may still be totally defeated in the event of the wreck or loss of the ship if it is proved that he did not use his utmost endeavours to save it.¹⁹ In every agreement of service an obligation by the seaman to exert himself to the utmost in the service of the ship is implied, and for this reason it has been held in England that a contract made with the crew in the course of a voyage for extra remuneration for special exertions is unenforceable, since the promise is without consideration and therefore void.²⁰ In Scotland, however, since gratuitous promises are binding, it is possible that such a contract would be upheld. In any event, it has been suggested that the rule does not apply where the contract involves extraordinary danger to life.²¹

¹³ *Horlock v. Beale*, 1916, 1 A.C. 486.

¹⁴ *Melville v. De Wolf*, 1855, 4 El. & Bl. 844.

¹⁵ *Horlock v. Beale*, *supra*; *Thompson v. Miller*, F.C. 28th May, 1906.

¹⁶ *Horlock v. Beale*, *supra*, Lord Atkinson, at 505.

¹⁷ Sec. 159.

¹⁸ Sec. 160; Merchant Shipping Act, 1906, sec. 34.

¹⁹ Sec. 157.

²⁰ *Harris v. Carter*, 1854, 3 El. & Bl. 559.

²¹ Bell, Comm. i., 511.

Time of Payment.—In the case of foreign-going ships other than ships in which the seamen are wholly compensated by a share in the profits of the adventure, a payment on account of wages is due when the seaman lawfully leaves the ship at the termination of his engagement, and the remainder within two clear days thereafter.²² If the wages are wrongfully withheld beyond these dates, they continue to run and be payable till “the time of final settlement.”²³ It has been held that the time of final settlement is the date of the interlocutor of the Court which awards the wages.²⁴ In the case of a home trading ship they are payable “within two days after the termination of the agreement with the crew, or at the time when the seaman is discharged, whichever first happens,” and a penalty is imposed for delay in payment which may be recovered as wages.²⁵

Forfeiture of Wages.—A seaman's wages may be forfeited for the offence of desertion or of absence without leave,²⁶ and for certain offences against discipline.²⁷ In the event of desertion his effects may also be forfeited.²⁸ Any question which arises concerning forfeiture of or deductions from wages “may be determined in any proceeding lawfully instituted with respect to those wages,” even although the offence is punishable by imprisonment in addition to forfeiture, and has not been made the subject of any criminal proceeding.¹

(a) **For Desertion:** (1) *Procedure for Enforcement.*—For desertion wages already earned may be forfeited, and if the desertion takes place abroad wages earned in any other ship in which the seaman may be employed until his next return to the United Kingdom.² The wages may be applied towards reimbursing the master or owner of the ship for the expenses caused by the desertion, and for the purpose of such reimbursement “the master or the owner or his agent may, if the wages are earned subsequently to the desertion, recover them in the same manner as the deserter could have recovered them if

²² Sec. 123 (a).

²³ Sec. 134 (c).

²⁴ *Lang v. St. Enoch's Shipping Co., Ltd.*, 1908 S.C. 103.

²⁵ Sec. 135.

²⁶ Sec. 221.

²⁷ Sec. 225.

²⁸ Sec. 221.

¹ Sec. 233.

² Sec. 231.

"not forfeited."³ Wages are recoverable by a seaman in a Court of summary jurisdiction in or near the place at which his service has terminated, or at which he has been discharged, or at which any person on whom the claim is made is or resides.⁴ Accordingly, the master, owner, or agent may proceed in a similar Court and in a similar manner, either against the seaman himself or against his subsequent employer. The procedure is, however, very difficult to apply to the case of the recovery of forfeited wages. Wages which have already been paid are generally spent by the seaman at once, and can seldom be recovered. Wages which have been earned but not yet paid can only be recovered from the person by whom they are payable. If they have been earned subsequently to the desertion, it is therefore necessary to proceed against the master or owner of the vessel on which they have been earned. For this reason it has been pointed out that the provisions of the Act are unworkable if the seaman after desertion takes service on a ship belonging to an owner resident abroad, more especially if he is subsequently discharged at a foreign port, and it has been observed that the provisions "seem applicable only to a British shipowner or "at best to a ship bringing the deserter to a British port."⁵ It is obviously impracticable to enforce the forfeiture in a foreign Court, and the power which many foreign consular officers possess of determining disputes regarding wages cannot be exercised by British Consuls. Even in the United Kingdom it is generally only possible to enforce the forfeiture in so far as there is a balance of wages due to the seaman. Excess of wages paid to a substitute engaged at a higher rate than the deserter may be recovered in a similar manner.⁶ This provision, however, does not apply to overtime paid for extra duties undertaken by the remainder of the crew in consequence of the desertion.⁷ Where summary proceedings are taken by the master and a sentence of imprisonment pronounced, and the seaman presents a note of suspension and liberation, it has been held that the master's implied authority does not authorise him to appear as a party in the litigation when carried to the Supreme Court by the seaman. In order to make the owners liable for such further litigation it is necessary that the same

³ Sec. 232 (a).

⁴ Sec. 164.

⁵ *Johnston Line, Ltd. v. Docherty*, 1924 S.L.T. (Sh.Ct.) 65, Sheriff Fyfe, at 66.

⁶ Sec. 221 (a).

⁷ *Johnston Line, Ltd. v. Docherty*, *supra*.

should be intimated to them, and if this is not done they are not liable in the expenses ultimately decerned for against the master in the Court of Appeal.⁸

(2) *Proof of Desertion.*—The onus of proof of absence of intention to desert rests on the seaman charged with the desertion.⁹ Evidence of the due engagement of the seaman and of his absence at the termination of the voyage or engagement, together with an entry of desertion in the official log-book, raises a presumption of desertion which is deemed to amount to proof unless the seaman can produce a proper certificate of discharge, or can otherwise show to the satisfaction of the Court that he had sufficient reasons for leaving his ship.¹⁰ In the case of desertion abroad certified copies of the entry in the official log-book are admissible in evidence.¹¹ Accordingly, the return of the vessel herself to the United Kingdom before proceedings are taken is unnecessary. The Court before which a seaman is charged with desertion has a summary power of ordering the offender to be taken on board ship or delivered to the master, owner, or agent to be so taken for the purpose of proceeding on the voyage, and may order the expenses properly incurred by reason of the offence to be paid by the offender, and, if necessary, to be deducted from his wages.¹²

(3) *Application of Sum Forfeited.*—The sum forfeited is applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship, and the balance, if any, is paid into the Exchequer.¹³ Formerly the entire proceeds of the forfeiture went to the master or owner. The balance so paid to the Exchequer is subject to all proper deductions, such as that for the price of slops supplied by the master by way of advance of wages with the knowledge of the owner.¹⁴

(b) *For Offences Against Discipline.*—In the case of offences against discipline no statutory method of recovery is provided. In such cases the entire proceeds of the forfeiture go to the master or owner.¹⁵ The offence requires to be entered in the official log-book, which, if possible, should be produced

⁸ *M'Naughton v. Alhusen & Co.*, 1847, 10 D. 236.

⁹ Sec. 231.

¹⁰ *Seward v. Ratter*, 1884, 12 R. 222.

¹¹ Sec. 229.

¹² Sec. 224 (1).

¹³ Sec. 232 (1).

¹⁴ *The "Parkdale"*, 1897, P. 53.

¹⁵ Sec. 232 (3).

and proved, otherwise the Court may decline to receive evidence of the offence.¹⁶

(c) **For Common Law Offences.**—Apart from the statutory offences of the Act, the degree of misconduct necessary to infer forfeiture of wages at common law is one of circumstances. A higher standard of conduct is naturally expected from the master and other certificated officers than from the ordinary seamen. Drunkenness is not a statutory offence against discipline and in the case of an ordinary seaman will probably not infer forfeiture of wages at common law, but it has been held to do so in the case of the master where the offence was aggravated by the introduction of spirits aboard the ship in breach of contract, even although the success of the voyage was not thereby imperilled.¹⁷ In England it has been held that habitual drunkenness on the part of the master during his employment infers forfeiture of wages.¹⁸ Under the Act drunkenness endangering life or the ship is a misdemeanour.¹⁹

Deductions from Wages.—Certain other deductions may be made from seamen's wages. By the Act the master is required to deliver to the Board of Trade an account of all deductions from seamen's wages.²⁰ The practice of the Board of Trade is to divide such deductions into "forfeitures" in the sense above used and "other deductions." The latter include sums paid in relief of the seaman's family during his absence on a voyage,²¹ and certain expenses in respect of his illness or his burial in case of death on service.²² Deductions may also be made in respect of slops supplied by the master.²³ A reduction of wages consequent on desertion is deemed to be a deduction from wages.²⁴

Claim of Owner or Master for Damages at Common Law.—Forfeiture of wages as provided in the Act does not bar any claim which the owner or master may have at common law

¹⁶ Sec. 282 (d).

¹⁷ *M'Kellar v. Macfarlane*, 1852, 15 D. 246.

¹⁸ Cf. *The "MacLeod"*, 1880, 5 P.D. 254.

¹⁹ Sec. 220.

²⁰ Sec. 132.

²¹ Sec. 182.

²² Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), sec. 34 (4).

²³ *The "Parkdale"*, 1897, P. 53.

²⁴ Merchant Shipping Act, 1906, *supra*, sec. 59.

for damages for negligence on the part of the seaman. The claim at common law is, however, essentially a civil claim in character, whereas forfeiture may be made the subject of criminal proceedings. Failure, therefore, to make the statutory entry of the seaman's misconduct in the official log-book, while it is sufficient to bar the exaction of the statutory penalty, does not bar the claim for damages at common law.²⁵ This common law principle is now expressly adopted in the provision of the Act, that the remedies which it provides for offences against discipline are not to take away or limit any other remedy which the owner or master would otherwise have for breach of contract in respect of the offences, provided always that he cannot be compensated more than once in respect of the same damage.²⁶

Statutory Compensation of Seamen.—In certain events a seaman may recover statutory compensation from the owner or master. Thus, if after signing an agreement of service he is discharged otherwise than in accordance with its terms "before the commencement of the voyage or before one month's wages are earned without fault on his part justifying a discharge and without his consent," he may recover compensation for the damage caused to him by the discharge, not exceeding one month's wages, in the same manner as if it were wages duly earned.²⁷ Similarly wages are not recoverable abroad in certain cases, and if the seaman on his return to the United Kingdom proves that the master or owner has been guilty of "any conduct or default" which, but for this provision, would have entitled him to sue abroad, he may recover, in addition to his wages, such compensation not exceeding £20 as the Court hearing the case thinks reasonable.¹ It has been observed that, although it is intended that such a claim should be made at the same time as the claim for wages, it is not incompetent to sue separately.² Such statutory claims to compensation do not deprive the seaman of his common law right to damages for breach of contract or on any other competent ground.³ The general principle applicable in such cases is that "as a general rule when a new remedy is introduced the

²⁵ *Sharp v. Rettie*, 1884, 11 R. 745.

²⁶ Sec. 226.

²⁷ Sec. 162.

¹ Sec. 166.

² *Alexander v. Little & Co.*, 1906, 8 F. 641, Lord President, at 645.

³ *Lang v. St. Enoch Shipping Co., Ltd.*, 1908 S.C. 103.

“common law remedy is not cut off except by express words or
“by very clear implication.”⁴

Allotment Notes.—The seaman may stipulate in the agreement of service by means of an allotment note in a form prescribed by the Board of Trade for the allotment during his absence to a near relative or to a savings bank of any part of his wages not exceeding one-half, or, by special agreement with the master, of a greater sum. The sum thus allotted may be recovered in the same manner as wages not exceeding £50 in amount,⁵ but the immunity of seamen's wages from attachment or arrestment does not apply to sums payable under such allotment notes.⁶ Where the service is interrupted by circumstances which make further performance of the contract impossible, the right to payment on allotment notes terminates along with it.⁷

Advance Notes.—It is also competent to insert in the agreement of service a stipulation for payment in advance “to or
“on behalf of the seaman conditionally on his going to sea in
“pursuance of the agreement” of a certain portion of his wages.⁸ With the exception of these stipulations, known as advance notes, and those for allotment notes, agreements to pay money to or on behalf of a seaman conditionally on his going to sea are void,⁹ and they form the only exceptions to the general rule that agreements by a seaman to forfeit his lien for or abandon his right to wages,¹⁰ or to sell or make a charge thereon prior to their accrual,¹¹ are void.¹² The use of advance notes was introduced owing to the improvident character of seamen. The purpose of the note is to enable the seaman to procure board and lodgings and to obtain clothing and other articles necessary for the voyage on the security of his wages, and at the same time to preclude cash payments of wages in advance which might either come into improper hands or be irrecoverable from the seaman if he failed to join the ship. Accordingly, the sum named in the note is not payable till

⁴ *Sharp v. Rettie*, 1884, 11 R. 745, Lord President, at 753.

⁵ Secs. 140-143; Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), secs. 61-62; Merchant Shipping (Seamen's Allotment) Act, 1911 (1 & 2 Geo. V. c. 8).

⁶ Sec. 163 (2).

⁷ *Horlock v. Beale*, 1916, 1 A.C. 486.

⁸ Sec. 140 (1) (a).

⁹ Sec. 140 (2).

¹⁰ Sec. 156.

¹¹ Sec. 163.

¹² *Rowlands v. Miller*, 1899, 1 Q.B.D. 735.

forty-eight hours have elapsed from the time when the ship proceeds to sea, payment is conditional on the seaman going to sea, and any person who makes cash advances on the note before the ship sails takes the risk of the seaman failing to join his ship and of the note being in consequence cancelled. Advances are usually made by boarding-masters, and it is thus directly in their interest that the seaman should not fail to join the ship. At the same time, the note provides a convenient method of enabling the seaman to obtain necessary articles on its security prior to the sailing of the ship. The advance is limited to one month's wages. No provision is made regarding advances to seamen going to sea from ports outside the United Kingdom. Abroad conditions are different, and advance notes would be inappropriate, not only because there would be no satisfactory method of enforcing them, but also because abroad the seaman might be placed in such a situation that an advance of a larger amount would be necessary. Advance notes, therefore, form an exception to the general rule laid down in sec. 124, whereby those provisions of the Act which concern agreements made with the crew of ships in the United Kingdom are expressly extended to the engagement of seamen abroad.¹³ The advance may take the form either of money or of its equivalent value in goods.¹⁴

Nature of the Obligation.—The notes are assignable,¹⁵ but they are not fully negotiable instruments,¹⁶ but the granter cannot repudiate all liability under them to third parties who make advances on them.¹⁶ Thus, although a third party must in general take the risk of the ship failing to sail, and so of the wages not being earned, it is not open to the granter himself to make the fulfilment of the contract impossible, as by cancellation of the voyage, and at the same time to plead non-fulfilment of a condition of it.¹⁷ In such circumstances he is liable to the third party to the extent to which the wages advanced have been actually earned at the time when the claim is made, but not for sums beyond that amount.¹⁸ Where, however, the non-fulfilment of the condition is due to circumstances beyond the granter's control,

¹³ *Ritchie v. Larsen*, 1899, 1 Q.B. 727.

¹⁴ *M'Kane v. Joynton*, 1858, 5 C.B. (N.S.) 218.

¹⁵ *Cardiff Boarding Masters v. Cory*, 1893, 9 T.L.R. 388.

¹⁶ *Robertson v. Fleming & Ferguson, Ltd.*, 1905, 21 Sh.Ct.Rep. 877.

¹⁷ *Walker v. Lord Advocate*, 1920, 1 S.L.T. 69.

¹⁸ *Alexander v. Bruce & Co.*, 1916, 32 Sh.Ct.Rep. 32.

such as the death or sickness of the seaman, he incurs no obligation to third parties, who must then obtain their remedy from the seaman himself.¹⁹ Since the notes are payable either to or "on behalf of" the seaman, the person who makes the advance to the seaman and obtains an assignation of the note from him has a title to sue on it.²⁰ It is expressly provided that, if after negotiating an advance note a seaman wilfully fails to join his ship or deserts before the note becomes payable, he may be prosecuted summarily, but that the rights which any person would otherwise have in respect of the "negotiation" of the note or which an owner or master would otherwise have for breach of contract shall not be affected.²¹ The term "negotiation" is here presumably used in a popular sense. An action for payment on an advance note against a shipbroker to whom it has been addressed is incompetent, unless he has an express mandate to meet the obligation. The mere fact that he is the granter's general agent is insufficient to infer liability.²²

Expenses of Conviction.—The Act provides that, in any proceeding relative to seamen's wages where it is shown that the seaman has been convicted in the course of the voyage of an "offence" by a competent tribunal and rightfully punished therefor, the Court may direct that any part of the wages due to him not exceeding £3 in value be applied in reimbursing any costs properly incurred by the master in securing the conviction and punishment.²³

Maritime Lien.—The seaman has a maritime lien for his wages in respect of the "mariner's contract" embodied in his statutory agreement of service. In England there is also a jurisdiction in Admiralty in respect of special contracts of service,²⁴ but whether such special contracts carry a maritime lien is uncertain.¹ The lien covers both the hull and freight of the vessel, even although the latter be due from a sub-charterer,² but not the cargo. It has been described as a *jus retenendi et*

¹⁹ *Bellamy & Co. v. Lunn & Co.*, 1897, 8 Asp. M.L.C. 348; *Hecht v. Hogarth*, 1901, 17 Sh.Ct.Rep. 222.

²⁰ *Martin v. Bow, M'Lachlan & Co., Ltd.*, 1905, 21 Sh.Ct.Rep. 230.

²¹ Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), sec. 65.

²² *Mitchell v. Cav, Prentice, Clapperton & Co.*, 1897, 13 Sh.Ct.Rep. 304.

²³ Sec. 161.

²⁴ Admiralty Court Act, 1861 (24 Vict. c. 10), sec. 10.

¹ *The "British Trade"*, 1924, P. 104.

² *The "Andalina"*, 1886, 12 P.D. 1.

insistendi as regards the hull, and as a proper hypothec only as regards the freight³; but, although the lien no doubt originated in possession, this view is no longer tenable, and it is a proper maritime lien in both cases, and is exercisable without possession. It attaches to the hull to the last fragment.⁴ It is not confined to wages actually earned on board the ship, but covers also subsistence money, travelling expenses, and probably anything which the seaman may fairly be said to have earned by his services, including wages due after a wrongful determination of the contract of service.⁵ It is so far exceptional that "it attaches to the ship independently of any personal obligation of the owner, the sole condition required being that such wages shall have been earned on board the ship."⁶ Thus, it attaches even where the seaman has been engaged by a person in fraudulent possession of the ship, provided that the seaman has discharged his duties in ignorance of the fraud,⁷ and for a similar reason a discharge by the master of his personal claim for wages against the owner does not discharge the liability of the ship. Thus, in such a case it has been held that a master might enforce his lien ten months after discharge and against persons who had in the interval as mortgagees acquired an interest in the ship without notice of the lien.⁸ It transmits to third parties who pay the seaman's wages, provided that the payment has been made on the credit of the ship, and opinions have been expressed that no formal assignation is necessary.⁹ In England, however, it has been held that it does not transmit in such circumstances to third parties unless the payment has been under authority of the Court.¹⁰ It is expressly provided that it cannot be forfeited by any agreement.¹¹

Pilotage Dues.—Although a pilot is expressly excluded from the meaning of the term "seaman" as used in the Merchant Shipping Acts,¹² he is a seaman in law, and a jurisdiction in Admiralty exists in claims by him for payment of his dues

³ Bell, Prin., sec. 1400; Comm. i., 513.

⁴ The "*Sydney Cove*," 1815, 2 Dods, 11.

⁵ The "*British Trade*," *supra*, the President, at 108.

⁶ The "*Castlegate*," 1893 A.C. 38, Lord Watson, at 52.

⁷ The "*Edwin*," 1864, Br. & L. 281.

⁸ The "*Chieftain*," 1863, Br. & L. 212.

⁹ *Clark v. Bowring*, 1908 S.C. 1168.

¹⁰ The "*Petone*," 1917, P. 198.

¹¹ Sec. 156 (1).

¹² Sec. 742.

which are in the nature of wages.¹³ By statute a pilot may recover his dues by summary procedure in a Court of summary jurisdiction, the persons liable being the owner or master of the vessel to which his services have been rendered, or such consignees or agents in the port of the ship's arrival, discharge, or departure "as have paid or made themselves liable to pay "any other charge on account of the ship."¹⁴ The intention of this provision is to enlarge the remedy of the pilot by enabling him to recover his dues, not only from the owner or master of the ship, but also from persons who have been indirectly benefited by his services and are in a position to indemnify themselves for any disbursements which they may make to him. Otherwise, if the owner resided at a distance or outwith the jurisdiction, recovery of his dues might be difficult or impracticable. It is probable that the total dues can be recovered in this way and not merely those incurred within the district of the port concerned, and that it is not necessary to obtain any certificate from the master that they have been incurred.¹⁵ The summary remedy is, however, not exclusive of other remedies, and the pilot may also proceed *in rem* in appropriate circumstances, as where the ship is already under arrest in another process or the owner is domiciled abroad. Ordinarily, however, summary proceedings provide the proper remedy, and, if they are needlessly neglected in favour of other proceedings, expenses may be withheld. It is uncertain whether a maritime lien exists for pilotage dues.¹⁶

Master's Wages.—For the purposes of the Merchant Shipping Act, the expression "master," unless the context otherwise requires, includes "every person (except a pilot) "having command or charge of any ship."¹⁷ He has, "so "far as the case permits," the same rights, liens, and remedies for the recovery of his wages as a seaman has under the Merchant Shipping Act or by any law or custom.¹⁸ In competition, however, the lien of the ordinary seaman takes precedence.¹⁹ The master's lien is not lost by reason of the fact that he is also part owner of the ship.²⁰ For the purpose of

¹³ *The "Clan Grant,"* 1887, 9 Asp. M.L.C. 144.

¹⁴ The Pilotage Act, 1913 (2 & 3 Geo. V. c. 31), sec. 49.

¹⁵ *Ward v. Lawson & Mitchell*, 1924 S.L.T. (Sh.Ct.) 11.

¹⁶ *The "Ambatielos": The "Cephalonia,"* 1923, P. 68.

¹⁷ Sec. 742.

¹⁸ Sec. 167 (1).

¹⁹ *The "Salacia,"* 1862, Lush. 545.

²⁰ *The "Feronia,"* 1868, 2 Adm. & Ec. 65.

recovering wages his position differs in many respects from that of an ordinary seaman. Thus, he is not deemed to be *inopes consilii* as an ordinary seaman is. His relationship also with the owners of the vessel is special. He enters a special contract with them, and is bound to account to them for his disbursements, and it is not the practice to pay his wages until this account has been settled. Moreover, he has a right of retention over the freight and earnings of the ship in so far as paid to him for his wages and disbursements.²¹ For these reasons, it has been held that the regulations of the Merchant Shipping Act regarding the time of payment of seamen's wages²² do not apply to the master.²³ It is provided, however, that if the owner has unreasonably delayed in payment of his wages, the Court may award to him in a claim for wages such additional sum as they think just in respect of the delay, without prejudice to any other claim which he may make on that account.²⁴ On similar grounds opinions have been expressed that the provision whereby seamen may not by agreement forfeit their lien on the ship, or be deprived of any remedy for the recovery of wages, or abandon their right to wages in the event of the loss of the ship,²⁵ does not apply to the master.¹ It has been held, however, that release of the owner from his personal liability for wages does not operate as a release of the ship from his lien, as is also probably the law in the case of the ordinary seaman.² His wages include a bonus.³

Master's Disbursements: (a) Rights of Master.—The master, and every person lawfully acting as master, by reason of his decease or incapacity through illness, has, "as far as the case permits," the same rights, liens, and remedies for the recovery of disbursements or liabilities properly made or incurred by him on account of the ship as he has for the recovery of his wages.⁴ The lien thus conferred covers any reasonable disbursements

²¹ *The "Princess Helena,"* 1861, Lush. 190.

²² Secs. 134-135.

²³ *The "Arina,"* 1886, 12 P.D. 118.

²⁴ Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), sec. 57.

²⁵ Sec. 156.

¹ *Nicholson v. Leith Salvage and Towage Co., Ltd.*, 1923 S.C. 409, Lord Hunter, at 442; *The "Wilhelm Tell,"* 1892, P. 337, Gorell Barnes, J., at 346.

² *The "Chieftain,"* 1863, Br. & L. 212.

³ *The "Elmville" (No. 2),* 1904, P. 422.

⁴ Sec. 167 (2).

arising directly out of the performance of his duty,⁵ and it is not necessary that money should actually have been paid provided liability has been incurred.⁶ It covers both hull and freight, but cannot be exercised over the freight in cases where it does not exist over the hull.⁷ The term "disbursements" has been defined as "disbursements by the master which he "makes himself liable for in respect of necessary things for "the ship for the purposes of navigation which he as master "of the ship is there to carry out—necessary in the sense "that they must be had immediately—and when the owner is "not there able to give the order, and he is not so near to the "master that the master can ask for his authority, and the "master is therefore obliged necessarily to render himself "liable in order to carry out his duty as master."⁸ The term "disbursements" must therefore be explained by reference to what are necessities.⁹ The term, however, "liabilities properly made or incurred by him on account of the ship" has a somewhat wider application.¹⁰

(b) Rights of Shipowner: Set-off or Counter Claim.—

The Act provides that "if in any Admiralty proceeding in any Court having Admiralty jurisdiction "touching the claim of a master in respect of wages, "or of such disbursements or liabilities as aforesaid, "any right of set-off or counter claim is set up, the Court may "enter into and adjudicate upon all questions and settle all "accounts then arising or outstanding and unsettled between "the parties to the proceeding, and may direct payment of "any balance found to be due."¹¹ The procedure to be followed in Scotland under this provision is not apparent. It appears to confer a higher right on the defender than that of mere compensation, and to be framed primarily with reference to English Admiralty practice, in which procedure by counter claim is recognised. In Scotland procedure by cross-action is used, and the actions are conjoined in circumstances when in England procedure would be by counter claim. Accordingly, it appears that the provision can only be taken advantage of in

⁵ *The "Elmville (No. 2)," supra.*

⁶ *The "Sara,"* 1887, 12 P.D. (C.A.) 158.

⁷ *The "Castlegate,"* 1893 A.C. 38.

⁸ *The "Orienta,"* 1895, P. (C.A.) 49, Lord Esher, M.R., at 55.

⁹ See *supra*, Ch. VIII.

¹⁰ *The "Elmville (No. 2),"* 1904, P. 422.

¹¹ Sec. 167 (3).

Scotland in cases where a plea of compensation would be competent or where cross-actions have been conjoined. Regarding the application of this provision, it has been observed that "it appears to me that the intention of the Legislature was not to refer to the Court the decision of all questions which might exist between the parties on matters entirely foreign either to wages or disbursements. The object of the section was to enable the Court to do justice when the owners set up a counter claim with reference to the ship or her disbursements."¹² Similarly, it has been observed that the set-off must be confined to matters connected with the ship¹³; where the master is himself a part owner it has been held in England that the defenders as co-owners may set-off matters of account between them and the master not only as master but also as co-owner.¹⁴

¹² *The "D. Jex,"* 1865, 2 M.L.C. (O.S.) 263, Dr. Lushington, at 264.

¹³ *The "Sara,"* 1889, 14 A.C. 209, Lord Watson, at 217.

¹⁴ *The "City of Mobile,"* 1873, 4 Adm. & Ec. 191.

CHAPTER X.

FORFEITURE OF SHIP, &c.

(a) FORFEITURE OF SHIP.

Forfeiture under the Merchant Shipping Acts.—Under the Merchant Shipping Acts ships may be subject to forfeiture to the Crown on a variety of grounds.¹ By the Merchant Shipping Act, 1894, it is provided that “where any ship has either wholly or as to any share therein become subject to forfeiture” under the portion of the Act which is concerned with registry, it may be seized and detained and brought for adjudication before the Court of Session, which “may thereupon adjudge the ship, with her tackle, apparel, and furniture, to be forfeited to Her Majesty, and may make such order in the case as to the Court seems just.”^{1a} It has been pointed out that the Act contains no power to appraise or sell the ship or to apply the proceeds for the benefit of British shareholders in proportion to their holdings. It is thought, however, that, if such a course appears to be desirable for the ends of justice, it may be taken under the equitable powers of the Court.² In Scotland no occasion has as yet arisen for the exercise of this jurisdiction, and the procedure is therefore uncertain. In England it has been held that the Court has no jurisdiction over a ship which is in custody of the Prize Court.³ It is not clear at what moment the forfeiture comes into operation. Under the Act of 1854,⁴ in which the term used was “shall be forfeited,” it has been held that the property in the ship vested in the Crown at the moment at which the act was done in respect of which she became liable to forfeiture.⁵ It is doubtful, however, how far this decision applies to the words “shall be subject to forfeiture” as used in the Act now in force. In the present Act the words “shall be for-

¹ Cf. secs. 16, 28 (4), 67 (2), 69, 70, 71, 72; Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), sec. 51 (2).

^{1a} Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 76 (1).

² Cf. “*The Polzeath*,” 1916, P. (C.A.) 241.

³ *The “St. Tudno (No. 2)”*, 1918, P. 174.

⁴ Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), sec. 103 (2).

⁵ *The “Annandale,”* 1877, 2 P.D. 179; (C.A.) 218.

"feited" occur also in the section dealing with the case of emigrant ships proceeding to sea without a clearance, in which case the ship falls to be dealt with "as if she had been seized" as forfeited under the laws relating to the Customs."⁶ Under that section also, however, there has been no decision, and it is thought that the forfeiture now comes into operation at the date of the decree of the Court.

Forfeiture under the Foreign Enlistments Act, 1870.—A ship may be forfeited for infringement of the Foreign Enlistments Act of 1870.⁷ By that Act "all proceedings for the condemnation and forfeiture of a ship or ship and equipment or arms and munitions of war" are in Scotland exclusively assigned to the Admiralty jurisdiction of the Court of Session. The Act further provides that a Court of Admiralty jurisdiction "shall, in addition to any power given to the Court by this Act, have in respect of any ship or other matter brought before it in pursuance of this Act all powers which it has in the case of a ship or matter brought before it in the exercise of its ordinary jurisdiction."⁸ It is uncertain whether under sec. 19 the Court has power to condemn the Crown in expenses.⁹ Under this Act there has been no decision in Scotland. In proceedings under the Foreign Enlistments Act of 1819,¹⁰ however, now repealed, whereby ships "may be prosecuted and condemned in the like manner and in such Courts as ships or vessels may be prosecuted and condemned for any breach of the laws made for the protection of the revenues and customs and excise or of the laws of trading and navigation,"¹¹ the Court formerly proceeded in virtue of the jurisdiction conferred on it by the Court of Exchequer (Scotland) Act, 1856.¹² Under the present Act, however, the Court acquires an independent jurisdiction in Admiralty. The procedure which will be followed is therefore uncertain.

Forfeiture under the Explosives Act, 1875.—Under the Explosives Act, 1875,¹³ ships containing explosive substances

⁶ Merchant Shipping Act, 1894, sec. 319 (1).

⁷ 33 & 34 Vict. c. 90.

⁸ Sec. 19.

⁹ *The "Gauntlet,"* 1872, 4 P.C. 184.

¹⁰ 59 Geo. III. c. 69.

¹¹ Sec. 7.

¹² 19 & 20 Vict. c. 56; *H.M. Advocate v. Fleming*, 1862, 2 M. 1032.

¹³ 38 & 39 Vict. c. 17.

may in certain events be "forfeited, sold, destroyed, or otherwise disposed of."¹⁴ Under this Act also there have been no decisions in Scotland, and the procedure is uncertain.

(b) REMOVAL OF MASTER.

By the Merchant Shipping Act, 1894, the Court of Session "may remove the master of any ship within the jurisdiction of that Court, if the removal is shown to the satisfaction of the Court by evidence on oath to be necessary."¹ It has at the same time power to cancel or suspend his certificate.² In Scotland there have been no proceedings under these provisions, and procedure is therefore uncertain, but it is probable that petition may be made to the Inner House. The grounds on which the jurisdiction may be exercised are entirely in the discretion of the Court.³ In England it has been exercised where the master was found to be guilty of fraudulent breach of trust. It is thought that jurisdiction may be exercised at the instance of one part owner, even where another part owner dissents, but there has been no express decision on the terms of the Act now in force.⁴ In England a Court of Admiralty jurisdiction has an inherent power to order a master, who has been dismissed from his ship, to deliver the ship's papers and other property belonging to the ship.⁵ It is probable that a similar power exists in Scotland, which in the Court of Admiralty might formerly be exercised by means of a commission and diligence.⁶ It is thought that an order *ad factum præstandum* might now be obtained.

(c) HOISTING ILLEGAL COLOURS.

The Merchant Shipping Act, 1894, after declaring what are the proper colours to be worn by British vessels, provides that where illegal colours or pennants are hoisted "on board any ship or boat belonging to any British subject, the master of the ship or boat, or the owner thereof if on board the same, and every other person hoisting the colours or pennants, shall for each offence incur a fine not exceeding five hundred

¹⁴ Secs. 87-96.

¹ Sec. 472.

² Sec. 470 (1) (c).

³ *The "Frances,"* 1820, 2 Dods, 420.

⁴ *The "Royalist,"* 1863, Br. & L. 46.

⁵ *The "St. Olaf,"* 1876, 2 Adm. & Ec. 113.

⁶ Smith's Maritime Practice, 66.

“pounds,” which may be recovered with expenses in the Court of Session, and the colours or pennants may be removed and “shall be forfeited to Her Majesty.”¹ The offence may also be prosecuted summarily, in which event the fine is limited to £100.² The master of a ship belonging to a British subject is also liable to a fine not exceeding £100 for failing to hoist the proper national colours on occasions on which this is obligatory.³ The Act further provides that “the provisions of “this Act with respect to colours worn by merchant ships shall “not affect any other power of the Admiralty in relation “thereto.”⁴ There have been no decisions in Scotland under these provisions, and procedure is therefore uncertain. It is thought, however, that procedure might be by an action by the Lord Advocate by subpoena and information as in the Court of Exchequer for the recovery of a statutory penalty.⁵ Where the fine is to be recovered summarily it is thought that proceedings might be taken in the Sheriff Court.

¹ Sec. 73 (1) (2) (3) (4).

² Sec. 73 (5).

³ Sec. 74.

⁴ Sec. 75.

⁵ Cf. *Lord Advocate v. Van Weel*, 1917 S.C. 227.

CHAPTER XI.

LIMITATION OF LIABILITY.

Circumstances in which Liability may be Limited.—The Merchant Shipping Act, 1894,¹ provides—

“ Sec. 503 (1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity, that is to say—

“ (a) Where any loss of life or personal injury is caused to any person being carried in the ship;

“ (b) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;

“ (c) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship;

“ (d) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship;

“ be liable to damages beyond the following amounts, that is to say—

“ (i) In respect of loss of life or personal injury, either alone or together, with loss of or damage to vessels, goods, merchandise, or other things, an aggregated amount not exceeding fifteen pounds for each ton of their ship's tonnage; and

“ (ii) In respect of loss to, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregated amount not exceeding eight pounds for each ton of their ship's tonnage.”

The right of the shipowner thus to limit his liability generally arises in respect of a collision between two or more vessels, but the right may also arise in other circumstances, as in con-

¹ 57 & 58 Vict. c. 60.

sequence of the vessel having stranded or having met with some similar accident,² or having foundered at sea without collision.³ By statute the right has been extended to cases where "any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable by reason of the improper navigation or management of the ship."⁴

"Owners."—The expression "owners" includes the owners of foreign vessels,⁵ and is not confined to registered owners, but includes also equitable owners,⁶ charterers by demise,⁷ and in certain circumstances hirers of lighters, barges, and like vessels. In such cases, however, the liability of the actual owners of the lighter, barge, or like vessel, in respect of loss of life or personal injury caused to any person carried therein, remains unaffected.⁸ The expression "owners" includes also shareholders in a shipowning company. The general manager of a shipowning railway company is not an owner unless he is also a shareholder.⁹ Where the damage or loss is due to the negligence of one part owner, the remaining co-owners are not thereby debarred from limiting their liability.¹⁰ In cases where a number of co-owners have been found jointly and severally liable for damage or loss, and some only are entitled to limit their liability, the practice is to grant decree against all jointly and severally to the extent of the limited liability, and *quoad ultra* against the others for the full amount of the balance, if any, remaining.¹¹ Dock, canal, harbour, and conservancy authorities may limit their liability in the same manner as shipowners in respect of "any goods, merchandise, or other things whatsoever" situated on board any vessel or vessels within their area,¹² but the liability requires to have been incurred in their proper capacity of dock

² *The "Stella,"* 1900, P. 161.

³ *The "Yarmouth,"* 1909, P. 293.

⁴ Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 & 64 Vict. c. 32), sec. 1.

⁵ Sec. 503 (1).

⁶ *The "Spirit of the Ocean,"* 1865, 34 L.J. Adm. 74.

⁷ Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), sec. 71.

⁸ Merchant Shipping Act, 1921 (11 & 12 Geo. V. c. 28), secs. 1 (2), 3.

⁹ *The "Yarmouth,"* 1909, P. 293.

¹⁰ *The "Spirit of the Ocean," supra.*

¹¹ *Duthie v. Caledonian Railway Co.,* 1898, 25 R. 934, Lord Moncreiff, at 944.

¹² Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 & 64 Vict. c. 32), sec. 2.

owners, &c., and if they also carry on work as ship repairers, they are not entitled to limit their liability for damage or loss occasioned by them in that capacity.¹³ The limitation applies also "to the owners, builders, or other parties interested in any ship built at any port or place in Her Majesty's dominions from and including the launching of such ship until the registration thereof under sec. 2 of the Merchant Shipping Act, 1894."¹⁴

"Ship."—The limitation of liability applies to any ship, whether British or foreign,¹⁵ as defined in the Act,¹⁶ and within the limits of the Act, therefore, the *lex fori* is applied to foreign ships. The expression "ship" includes British ships lawfully exempt from registration,¹⁷ but not British ships which are not recognised as such within the meaning of the Act.¹⁸ It has been held that a foreign ship which at the date of the collision had been sold to British purchasers, but was still registered as a foreign ship, was a foreign ship and entitled to limitation.¹⁹ For the purpose of limitation the expression "ship" has been extended to include "every description of lighter, barge, or like vessel used in navigation in Great Britain, however propelled: provided that a lighter, barge, or like vessel used exclusively in non-tidal waters, other than harbours, shall not, for the purposes of this Act, be deemed to be used in navigation."²⁰

"Actual Fault or Privity."—The meaning of the expression "actual fault or privity" is in each case a question of fact. Actual fault or privity will arise if the ship is for any reason unseaworthy, since seaworthiness is implied in the contract of affreightment.²¹ Thus it has been held that failure by the owners to communicate to the master certain instructions issued by the builders for the safe navigation of a ship of a special type of construction infers their actual fault or privity.²²

¹³ *The "City of Edinburgh,"* 1921, P. (C.A.) 274.

¹⁴ Merchant Shipping (Liability of Shipowners) Act, 1898 (61 & 62 Vict. c. 14), sec. 1.

¹⁵ Sec. 503.

¹⁶ Sec. 742.

¹⁷ *The "Brunel,"* 1900, P. 24.

¹⁸ Sec. 508.

¹⁹ *The "Brinio,"* 1891, 90 L.T.J. 249.

²⁰ Merchant Shipping Act, 1921 (11 & 12 Geo. V. c. 28), sec. 1 (1).

²¹ *Smitton v. Orient Steam Navigation Co., Ltd.*, 1907, 12 Com. Cas. 270.

²² *Standard Oil Co. of New York v. Clan Line Steamers, Ltd.*, 1924 S.C. (H.L.) 1.

Damage, however, which is due to negligence of the crew to which the owners are not privy does not.²³ The mere fact that the owner is on board his vessel at the time of a collision does not infer his actual fault or privity, provided that he is not actually in control of the vessel.²⁴ Where the owners are a corporation, the question of actual fault or privity requires to be decided on the circumstances of each case. The question to be determined is who is "the person who is really "the directing mind and will of the corporation, the very *ego* "and centre of the personality of the corporation." This is usually the managing owner, and his action is presumed to be the action of the corporation, unless the contrary is proved.²⁵ The actual fault or privity of one of a number of part owners does not disentitle his co-owners to limit their liability.¹ In all cases the onus of proving the absence of actual fault or privity rests on the owner averring it.²

"Improper Navigation."—The expression "improper navigation" is not confined to the personal acts of the master or crew, but may extend to the consequences of the negligence of a person on shore.³ Mere breach of a contract of towage does not in itself infer "improper navigation" on the part of the tug, and even where improper navigation by a tug in such circumstances is proved, whether it arises from breach of the contract or from delict, the owner of the tug may nevertheless limit his liability in terms of the Act if it occurred without his actual fault or privity.⁴ Similarly, the opinion has been expressed that breach of a contract of towage does not in itself infer "improper navigation or management of the ship" as the expression is used in the Merchant Shipping (Liability of Shipowners and Others) Act, 1900.⁵ Where damage by collision has been caused to a third vessel by a tug in consequence of the improper navigation of both the tug and its tow, the tonnage of the tug is not the proper measure of the total liability of the two vessels for purposes of limitation,⁶ and it is

²³ *The "Diamond,"* 1906, P. 282.

²⁴ *Kidston v. M'Arthur*, 1878, 5 R. 936; *The "Satanita,"* 1897 A.C. 59.

²⁵ *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co.*, 1915 A.C. 705, Lord Haldane, L.C., at 713.

¹ *The "Spirit of the Ocean,"* 1865, 34 L.J. Adm. 74.

² *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co.*, *supra*.

³ *The "Warkworth,"* 1884, 9 P.D. 145.

⁴ *Walberg v. Young*, 1876, 4 Asp. M.L.C. 27, Lord Coleridge, C.J., note at 28.

⁵ 63 & 64 Vict. c. 32, sec. 1; *The "Vigilant,"* 1921, P. 312.

⁶ *The "Englishman" and The "Australia,"* 1894, P. 239, the President, at 246.

probable that where both are entitled to limit their liability the proper measure is their combined tonnage. Where damage by collision has been caused to a third vessel by a tow in consequence of the improper navigation of its tug, which is in fact in control of the navigation, and both tug and tow belong to the same owners, and decree in an action *in rem* is pronounced against the tow, it has been held that the measure of the owners' liability is the tonnage of the tow alone.⁷ It has been pointed out that this decision does not necessarily imply that no damages can be awarded as against the tug merely because no claim was in fact made against the owners *qua*-owners of the tug; nor that the vessel actually in collision can alone be involved in liability. The circumstances might well be such that the tug and tow were in the position of joint tortfeasors.⁸

"Distinct Occasions."—The Act further provides that "the owner of every seagoing ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to vessel, goods, merchandise, or things as aforesaid arising on distinct occasions to the same extent as if no other loss, injury, or damage had arisen."⁹ The meaning of the term "distinct occasions" in the case of collision is a question of fact, the test being not lapse of time between the two collisions, but whether both are the result of the same act of want of seamanship.¹⁰ Where the two collisions are in fact the result of a single act of want of seamanship, the owner of the vessel is entitled to limit his liability as if a single collision had occurred.¹¹

"Seagoing Ship."—The meaning of the expression "seagoing ship" is also one of fact. Thus, a ship which sails in tidal waters, but does not proceed beyond the limits of the port of Liverpool, is not a seagoing ship, but one which actually proceeds to sea is.¹² A ship which sails in the Firth of Clyde between Greenock and Campbeltown is a seagoing ship, and the fact that her crew sleep on shore and provide their own food does not alter her essential character.¹³

⁷ *The "Ran": The "Graygarth,"* 1922, P. 80.

⁸ *The "Harlow,"* 1922, P. 175.

⁹ Sec. 503 (3).

¹⁰ *The "Schwan": The "Albano,"* 1892, P. 419.

¹¹ *The "Rajah,"* 1872, 3 Adm. & Ec. 539.

¹² *Salt Union, Ltd. v. Wood,* 1893, 1 Q.B.D. 370.

¹³ *Turbine Steamers, Ltd. v. M'Laughlin,* 1922, 39 Sh.Ct.Rep. 22.

Jurisdiction.—It is competent to claim and establish the right to limit liability in any proceedings relative to the accident in respect of which limitation of liability is sought, provided that such limitation is relevant to the proceedings. Thus the right may be pled in defence to an action for damage to cargo, and it is not necessary for the plea that liability for the accident should be admitted.¹⁴ The right may thus be established either in the Court of Session or in the Sheriff Court. The right, however, is thus established only as against the pursuers in that action and for the purposes of the action. For this reason the defender is not in safety to meet their claims to the full extent of his statutory limitation, since there may be other claimants whose claims, if subsequently established, may require to be met. Accordingly, the Act provides that where any liability is alleged to have been incurred and several claims are made or apprehended in respect of it, the shipowner may apply to the Court of Session, and that Court “may determine the amount of the owners’ liability and “may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other “Court in relation to the same matter, and may proceed in such “manner and subject to such regulations as to making persons “interested parties to the proceedings, and as to the exclusion “of any claimants who do not come in within a certain time, “and as to requiring security from the owner, and as to payment of any costs, as the Court thinks just.”¹⁵ It has been pointed out that the Court does not create the immunity of the shipowner, which is conferred by the Act itself, but that its function is merely to ascertain the amount of the fund for which he is liable under the Act, and thereafter to distribute it rateably among the claimants.¹⁶ In practice the amount of the fund is seldom in dispute, since it may generally be calculated accurately from the tonnage of the vessel in accordance with the rules provided by the Act.

Procedure: (a) The Petition.—Procedure is by a petition, addressed to the Inner House, which may be presented by the owner of the vessel in respect of which the limitation of liability is sought. The petition is entirely in the interest of the owner

¹⁴ *Standard Oil Co. of New York v. Clan Line Steamers, Ltd.*, 1924 S.C. (H.L.) 1.

¹⁵ Sec. 504.

¹⁶ *Owners of the Cargo of the “Anglia” v. Owners of the “Anglia,”* 1906, 8 F. (H.L.) 22, Lord Robertson, at 24.

himself, since by presenting it he may escape the full liability for the fault of his servants which he would otherwise incur, and may avoid the expense of defending a number of actions of damage. This fact is recognised in the Act itself, and it has been pointed out that no one except the owner can bring the provisions dealing with limitation of liability into operation, and, accordingly, that unless the owner takes proceedings under sec. 504 the preceding section will not come into operation to the effect of regulating the rights of claimants *inter se*.¹⁷ It has been observed further that the procedure is in no sense one for the assessment of damage, but is merely directed to the distribution of a limited fund lodged in Court, and follows the ordinary rules applicable in such processes. "It has to be conducted upon the same principles as we are accustomed to apply in other processes of distribution—some of them very familiar—as, for instance, sequestrations in bankruptcy, rankings and sale, multipointings by executors who allege insolvency, and similar proceedings,"¹⁸ and that the petitioner "is in the position of the holder of a fund or the real raiser in an action of multipointing."¹⁹ The method of assessment of the value of the individual claims, if not already determined, is in the discretion of the Court, but frequently a remit is made for this purpose to an average adjuster.²⁰

The petition may be brought even although no claim for loss or damage has been made. If, however, it is clearly unnecessary, it will be refused. Thus, where damage had already been assessed by a jury in an action for damages by collision at the full amount to which the defender's liability was limited, and the defender subsequently petitioned for the rateable distribution of the same, the petition was refused as unnecessary on the ground that the only claimant was the pursuer in the action who had already been found entitled to the whole sum.²¹

(b) Consignation.—The owner is required to consign a sum sufficient to meet the claims which may be made. The amount required is in the discretion of the Court. In all cases there is a presumption that a sum representing at least £8 per ton

¹⁷ *Canadian Pacific Railway Co. v. s.s. "Storstad,"* 1920 A.C. 397, Lord Sumner, at 401.

¹⁸ *Owners of s.s. "Olga" v. Owners of s.s. "Anglia,"* 1905, 7 F. 739, Lord Kyllachy, at 745.

¹⁹ *Rankine v. Raschen,* 1877, 4 R. 725, Lord President, at 729.

²⁰ *Carron Co. v. Cayzer, Irvine & Co.,* 1885, 13 R. 114.

²¹ *Flensburg Steam Shipping Co. v. Seligman,* 1871, 9 M. 1011.

of the ship's tonnage is needed, since otherwise limitation of liability would be unnecessary, and consignment of this amount is invariably required, together with interest from the date of the accident until payment into Court. Whether a larger sum is necessary is a question of circumstance. Where claims for loss of life or personal injury are made or apprehended, the Court usually requires consignment of £15 per ton. It is, however, found in practice that claims for loss of life or personal injury seldom approach in the aggregate the £7 per ton on which they rank preferably, and occasionally where it is clear that they will be considerably less the Court may be satisfied with security of a smaller amount.²² Frequently the petitioner is willing to consign a sum representing £8 per ton and to give bail for the balance of £7 if required. In this case interest runs on the sum payable under the bail bond, if any, from the date of the accident until payment.²³

(c) **Answers and Claims.**—Any person who desires to recover damage may lodge answers to the petition or claim on the fund. Answers may proceed on any relevant ground of exception to the competency of the petition, such as that the accident did not occur without the actual fault or privity of the petitioner. Occasionally, also, exception is taken to the petitioner's method of calculation of the sum to which his liability is limited. If necessary proof may be taken and a remit made for that purpose to one of the judges of the Division to which the petition has been presented. If no exception is taken to the competency of the petition claims only are lodged.

The period allowed for lodging answers or claims is in the discretion of the Court, and is determined by the particular circumstances of each case. At the end of this period the fund is distributed by the Court, and the balance, if any, paid over to the petitioner, even although all possible claims have not been lodged.²⁴

(d) **Interest.**—Interest is not included in the sum to which liability is limited, and must be allowed for in addition. It runs on the sum found due from the date of the collision. This is not contrary to the general rule of common law that damage does not bear interest, since interest is one of the items

²² Roscoe's Admiralty Practice, p. 288.

²³ *The "Crathie,"* 1897, P. 178.

²⁴ Cf. *The "Alma,"* 1903, P. 55.

which is taken into account when damage is assessed. In the case of limitation of liability damage is not in fact assessed at all, but is fixed by Act of Parliament, and for this reason interest runs from the date when liability attaches until consignment in Court or payment.²⁵

Persons Entitled to Rank on the Fund.—Any person who has sustained damage in the accident is entitled to rank on the fund on proof of damage. The owner of the ship in fault is not entitled to rank in his own right,¹ and since the provisions for limitation of liability do not create any new right, but merely restrain existing rights by substituting a limited for an unlimited liability, it follows that an assignee can acquire no right to rank from him. Thus, where one ship has been sunk in collision with another vessel belonging to the same owner, the underwriters, as assignees of the owner's rights, have no right to rank on the fund in respect of the damage, since the owner has only paid the fund into Court in respect of liabilities for which he is answerable, and he cannot be answerable for damages against himself.² The owner is, however, on equitable grounds entitled to state claims as in right of parties whose claims he has already settled extrajudicially,³ or under a decree. He may, however, only take credit for such claims to the extent to which the claimants would have been entitled to rank on the fund had the claims not been settled. Thus, if the owner has paid a claim in full before petitioning for limitation of liability, he is not entitled to rank on the fund for the excess thus paid over the statutory limit. For this reason, to avoid injustice it has been held that if he has been found liable in a jury trial for the full amount of a claim before he has petitioned to have his liability limited, the extract of the decree may be superseded for a limited period to give him an opportunity of petitioning for limitation, if so advised.⁴ It is immaterial that the claims have been settled abroad and that the claimants are not subject to the jurisdiction, and the owner may rank in respect of such claims though paid under a foreign system of limitation or for an amount not limited according to the British rule of

²⁵ *Burrell v. Simpson & Co.*, 1876, 4 R. 177; *Owners of s.s. "Olga" v Owners of s.s. "Anglia"*, 1905, 7 F. 739.

¹ *The "Kronprinz Olaf"*, 1921, P. (C.A.) 52.

² *Simpson & Co. v. Thomson*, 1877, 5 R. (H.L.) 40.

³ *Rankine v. Raschen*, 1877, 4 R. 725.

⁴ *MacLean v. Clan Line Steamers, Ltd.*, 1925 S.C. 256.

limitation.⁵ Similarly, the owner of the damaged ship is not entitled to rank where he is also the owner of the ship in fault. The master and crew of the damaged ship are, however, entitled to do so in such circumstances, and the doctrine of common employment does not apply as between them and the master and crew of the ship in fault to the effect of barring their right.⁶ Both at common law and under the Admiralty Suits Act, 1868,⁷ the Crown is entitled to rank on the fund.⁸ It is probable that a holder of a bottomry bond on freight may rank in respect of his bond on the sum, if any, found due for loss of freight.⁹ The fact that findings of value have already been made in an action for damages arising out of the same circumstances does not preclude the question of value being reopened in a petition for limitation of liability by claimants who were not present at the original proceedings. Thus, where the owners of one ship had obtained a decree for damages by collision against the owners of another, and the latter had subsequently presented a petition for the limitation of their liability, the owners of the cargo on board the damaged ship were held entitled to appear in the petition and reopen the question of value. In such a case it is unnecessary to prove that the decree has been obtained by fraud or collusion, or that an error had occurred through carelessness or incompetence or indifference, since "in the scheme of the statute it is a correlative of "the limitation of liability that the rights of participants in "the limited fund shall be determined in the presence of those "truly concerned."¹⁰ Similarly, an agreement between two shipowners in the case of a collision that both vessels are in fault does not preclude a cargo owner from appearing in proceedings for limitation of liability and pleading that the plaintiff is alone in fault.¹¹ The mere discontinuance of an action for damage by collision is not an agreement to abandon all claims in respect of the collision, and, accordingly, the owner of the damaged ship may subsequently state a claim in proceedings brought by the owner of the ship in fault to limit his liability.¹²

⁵ *The "Coaster,"* 1922, 15 Asp. M.L.C. 560.

⁶ *The "Petrel,"* 1893, P. 320.

⁷ 31 & 32 Vict. c. 78, sec. 3.

⁸ *The "Zoe,"* 1886, 11 P.D. 72.

⁹ *The "Empusa,"* 1879, 5 P.D. 6.

¹⁰ *Owners of Cargo of s.s. "Anglia" v. Owners of s.s. "Anglia,"* 1906, 8 F. (H.L.) 22, Lord Robertson, at 25.

¹¹ *The "Karo,"* 1888, 13 P.D. 24.

¹² *The "Ardandhu,"* 1886, 11 P.D. 40.

Order of Ranking.—Claimants rank rateably on the fund, but those claiming in respect of loss of life or personal injury are preferred to the extent that they rank in priority on the amount representing the difference between the liability in respect of damage and the liability in respect of loss of life or personal injury. On the balance they rank *pari passu* with claimants in respect of damage.¹³ This principle, however, only applies where there is a fund created by the operation of the Act itself, and there is no “ground for assuming a policy or “intention on the part of the Legislature to establish a general “preference applicable to all circumstances in favour of life “claimants or to treat any sum which may happen to be in “Court in a collision action generally as if it had been brought “into Court in one particular way under the statute.”¹⁴ When the fund is insufficient to meet the claims in full, the various claimants have an adverse interest which may entitle them to answer the claims of the other claimants. *Inter se* claimants have the same rights which they have against the petitioner and the same rights which he has against them.¹⁵ Accordingly, one claimant may plead that the claim of another is barred by statute, but if the plea is founded on sec. 8 of the Maritime Convention Act, 1911, the discretion vested in the Court by that section is such that it may allow the claim to be made.¹⁶

Where two ships are found to blame for a collision, and the loss is divided equally under the old rule of division of loss, but the damage actually sustained is unequal, and the owner of the vessel which has done the greater damage takes proceedings to limit his liability, the owner of the other vessel ranks on the fund *pari passu* with the other claimants for the amount by which half the damage of his vessel exceeds half the damage of the limiting ship.¹⁷ The same rule applies *mutatis mutandis* where the loss is divided unequally under the Maritime Convention Act, 1911.¹⁸

Form of Petition.—The petition should declare that the petitioners are the owners of the vessel in respect of which limitation of liability is sought, and that the collision or other

¹³ *The “Victoria,”* 1888, 13 P.D. 125.

¹⁴ *Canadian Pacific Railway Co. v. s.s. “Storstad,”* 1920 A.C. 397, at 402.

¹⁵ *The “Dispenser,”* 1920, P. 228.

¹⁶ 1 & 2 Geo. V. c. 57.

¹⁷ *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co.,* 1882, 7 App.Cas. 795.

¹⁸ 1 & 2 Geo. V. c. 57, sec. 1.

accident in respect of which claims of damage have been made or are apprehended occurred without their actual fault or privity. It should state the gross and net tonnage of the vessel, and whether the claims made or apprehended are in respect of loss of life or personal injury, or merely in respect of damage to or loss of property. The amount to which in the circumstances above narrated the petitioners' liability is limited under the provisions of the Act should then be stated, and that the petitioners are willing to consign this sum in Court or to find security for it, with interest from the date at which the accident occurred. If claims have already been settled either under decree or extrajudicially, the amount thereof should be stated, since the petitioners may themselves state claims as in right of the persons whose claims have already been settled, and there is nothing in the Act to override this equitable principle.¹⁹ They may, however, only claim up to the amount of the statutory limitation, and cannot take credit for any excess they may have paid. If liability for the accident has not already been admitted or established, it is unnecessary to admit it in the petition, but if this is not done the Court will not stay proceedings to establish liability which may be pending elsewhere.²⁰ The petition should crave for intimation on the walls and in the minute book in common form and for advertisement; for appointment of all parties interested to lodge claims and answers; for stay of all proceedings pending or to be instituted in that or any other Court in respect of the premises; for limitation of the petitioners' liability to the amount of statutory limitation; for distribution of the sums found due to the several claimants; and thereafter for discharge of the petitioners from all claims in respect of the accident which have not been lodged within the time appointed by the Court.²¹

Accounting between Part Owners.—The Act provides that “all sums paid for or on account of any loss or damage in respect whereof the liability of owners is limited under the provisions of this part of this Act, and all costs incurred in relation thereto, may be brought into account among part owners of the same ship in the same manner as money disbursed for the use thereof.”²²

¹⁹ *Rankin v. Raschen*, 1877, 4 R. 725.

²⁰ *Miller v. Powell*, 1875, 2 R. 976.

²¹ *Scots Style Book*, vii., 160.

²² Sec. 505.

Contracting out of Limitation of Liability.—It is not incompetent for the owner to contract out of his right of limitation of liability, although there is a strong presumption against such a contract, and it is unknown commercially. The presumption, however, is less strong in the case of a yacht than in that of a merchant vessel engaged in trade, since the former, unlike the latter, does not proceed to sea in all conditions of weather, and its value bears little relation to its tonnage.²³

Stay of Proceedings Pending in another Court.—The circumstances in which proceedings pending in another Court in relation to the same matter may be stayed is in the discretion of the Court, who may make such regulations as it thinks just. The power of staying such proceedings is necessary, not only in order to give effect to the immunity which the Act confers on the shipowner, but also to the finding of the Court regarding the amount of his liability and the distribution of the fund. Proceedings pending abroad for the recovery of damage for a collision may be stayed and the plea of *forum non conveniens* repelled, even where the collision in respect of which the petition has been brought has occurred in foreign waters, and the action has been raised before a foreign tribunal.²⁴ Proceedings pending abroad, however, will not be stayed in so far as they are directed merely to the assessment of damage. Where an action for damages for collision was pending in the Sheriff Court of Lanarkshire the High Court in England issued an order staying “all proceedings in actions pending . . . “in the Sheriff Court, Lanarkshire, except for the purpose of “assessing damage.” The pursuer in the action for damages subsequently appealed to the Court of Session for jury trial, and the defenders, founding on the order of the High Court, moved the Court to sist the action *hoc statu*. The Court were of opinion, however, that the English Court were the sole judges of whether proceedings should be allowed to go on elsewhere or not, but that the order of the English Court was not intended to stay proceedings in such an action as was pending in the Scottish Court, in any event up to the point at which damages might be assessed by the jury, but was merely intended to prevent decree being extracted, and that the fact that the proceedings in question were in fact pending in the Court of Session and not in the Sheriff Court was a mere technical objection

²³ *The “Satanita,”* 1897 A.C. 59.

²⁴ *Hay v. Jackson & Co.,* 1911 S.C. 876.

that should not be sustained.²⁵ In the case of loss of or damage to property proceedings pending in another Court will only be stayed if the petitioner admits liability and makes adequate consignment. If he denies liability they will be allowed to proceed.¹ In the case of claims for loss of life or personal injury they will not be stayed even where consignment is made of the full amount of the statutory liability.²

Res judicata.—The mere fact that a claimant has raised an action in a foreign Court for damage by collision does not debar him from ranking on a fund in Court in this country for the full amount of his claim, but the sum, if any, recovered abroad will be deducted from his share.³ Where, however, an action *in rem* for damage by collision has been dismissed by decree of a foreign Court of competent jurisdiction, the pursuer in that action is debarred from ranking in a proceeding subsequently brought by the defender in this country to limit his liability in respect of claims by other parties for damages for the same collision, since the pursuer's claim against the ship has been entirely discharged by the foreign decree, and the sum paid into Court in the limitation proceeding represents the ship.⁴

Calculation of Ship's Tonnage.—The tonnage on which the owner's limitation of liability is based is the tonnage of the vessel, subject to certain deductions.⁵ The tonnage taken is the tonnage of the vessel as it appears on the register at the date of the accident.⁶ The register, however, is not conclusive evidence, and it may be shown that the entry in the register is not in conformity with the provisions of the Act.⁷ The copy of the register which is produced in evidence must be a copy of the register at the time of the accident.⁸ There have been a number of decisions on the proper construction of the rules

²⁵ *Leadbetter v. Dublin and Glasgow Steam Packet Co.*, 1907 S.C. 538.

¹ *Miller v. Powell*, 1875, 2 R. 976.

² *The "Nereid"*, 1889, 14 P.D. 78.

³ *The "Crathie"*, 1897, P. 178.

⁴ *The "Belcairn"*, 1885, 10 P.D. 161.

⁵ Sec. 503 (2); cf. Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), secs. 77-87, 210, Second and Sixth Schedules; Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), secs. 54, 55, 64, 69; Merchant Shipping Act, 1907 (7 Edw. VII. c. 52).

⁶ *The "John M'Intyre"*, 1881, 6 P.D. 200; *The "Dione"*, 1885, 5 Asp. M.L.C. 347.

⁷ *The "Franconia"*, 1878, 3 P.D. 164, at 179; *The "Recepta"*, 1889, 14 P.D. 131.

⁸ *The "Rosslyn"*, 1904, 10 Asp. M.L.C. 24.

of measurement of tonnage.⁹ The doubt raised by the conflict of decisions in the cases of *Owners of the "Olga" v. Owners of the "Anglia"*¹⁰ and *The "Corderillas"*¹¹ has now been removed by the Act of 1906.¹²

Law to be Applied.—Apart from the statutory provisions of the Act, the question whether the right of the shipowner to limit his liability for damage by collision is one of substantive law, and therefore one to which the law of the flag is to be applied, or one of remedy, to which the *lex fori* is to be applied, has never been determined. Although in one case it has been treated as one of substantive law,¹³ the question appears to be still open, and may be of importance in cases where by the law of the ship's flag the liability of the owner is limited to a smaller sum than it would be by British law, as where by the law of the flag the owner of a ship which has been lost in collision may, by abandoning her and her freight, escape all further liability.¹⁴ The right of limitation is not a general principle of maritime law. Thus, although it has been part of the law of Holland and France from very early times, both in Scotland and in England it is purely statutory. In questions regarding limitation of liability, therefore, the *lex fori* cannot be applied on the ground on which it has been applied in questions regarding the existence of liability, namely, that liability for collision is *communis juris*, and that in applying the *lex fori* in such cases the Court is not applying its own municipal law but the general maritime law as it is administered in its Courts.¹⁵ The view that the *lex fori* should be applied may be supported on the ground laid down in the case of contract in *Don v. Lippman*,¹⁶ namely, that parties "bind themselves to do what the law they are living under requires; but as they bind themselves generally and without regard to one country more than another, they contemplate the possibility of the obligation being enforced or resisted in other countries."

⁹ *Leith, Hull, and Hamburg Steam Packet Co. v. Lord Advocate*, 1873, 11 M. 597; *Lord Advocate v. Clyde Steam Navigation Co.*, 1873, 11 M. 440; *Owners of s.s. "Olga" v. Owners of s.s. "Anglia"*, 1905, 7 F. 739; *The "Pilgrim"*, 1895, P. 117; *The "Umbilo"*, 1891, P. 118; *The "Corderillas"*, 1904, P. 90.

¹⁰ *Supra*.

¹¹ *Supra*.

¹² Sec. 55.

¹³ *Cope v. Doherty*, 1858, 4 K. & J. 367, Wood, V.C., at 384.

¹⁴ Cf. *La Société du Gaz de Paris v. Les Armateurs Français*, 1925 S.C. 332.

¹⁵ *The "Leon"*, 1881, 6 P.D. 148.

¹⁶ 1837, 2 Sh. & MacL. 682, Lord Brougham, at 725.

Expenses.—On the general ground that the procedure has been rendered necessary by the fault of the petitioner, the expenses of the petition are borne by him, and include those of all the claimants in stating reasonable claims, of obtaining a remit to an average adjuster where necessary, and of giving effect to his award.¹⁷ This general rule is not modified by the fact that the vessel of a claimant may be also in part to blame, since the procedure is entirely in the interest of the petitioner, and it is undesirable that the fund to which liability has been limited should be encroached on by the expenses of the petition.¹⁸ Certain exceptions are, however, admitted. Thus, if a claim is unreasonable the claimant will not be allowed expenses. Where the petitioner had personally guaranteed that a claim would be met in full and the claim had nevertheless been lodged, the expenses of the claim were refused on the ground that the solvency of the petitioner was unquestionable, and that, therefore, the claim was unreasonable in the circumstances.¹⁹ Similarly, the petitioner is not liable for the expenses of adjusting claims caused by the competition of the claimants *inter se*.²⁰ The expenses of altering claims are clearly competitive, and therefore fall to be paid by the claimants.²¹ Moreover, since one object of the procedure is to limit expense as far as possible, several claimants of the same class claiming on the same grounds will not be allowed the expenses of separate appearances. For similar reasons, the master and crew should join in stating a single claim. Where a claim is unopposed the Court will only allow the expense of preparing and lodging it and of one counsel to take decree.²² Where a party opposes the petition on the ground that the petitioner is not entitled to limitation of liability and fails, it has been held that he is liable for such part of the expenses of the petition as are due to his contention.²³ It has been observed that, where parties have made grossly excessive claims for damages, it may be that in a petition for limitation of liability they will not recover their expenses.²⁴

¹⁷ *Carron Co. v. Cayzer, Irvine & Co.*, 1885, 13 R. 114.

¹⁸ *Owners of s.s. "Olga" v. Owners of s.s. "Anglia"*, 1907 S.C. 1045.

¹⁹ *Clan Line Steamers, Ltd., Petr.*, 30th June, 1925 (not reported).

²⁰ *Carron Co. v. Cayzer, Irvine & Co.*, *supra*.

²¹ *Kennedy v. Clyde Shipping Co., Ltd.*, 1908 S.C. 895; *Burrell v. Simpson & Co.*, 1877, 4 R. 177.

²² *Burrell v. Simpson & Co.*, 1877, 4 R. 1133.

²³ *Couper v. Mackenzie*, 1906, 8 F. 1202.

²⁴ *Miller v. Powell*, 1875, 2 R. 976, Lord President, at 979.

PART III.
PRACTICE OF THE SPECIAL SHIPPING
COURTS.

CHAPTER I.
COURT OF FORMAL INVESTIGATION (BOARD OF
TRADE INQUIRY).

Constitution of the Court.—The investigation of shipping casualties is under the general control of the Board of Trade. The Merchant Shipping Act, 1894,¹ provides that “Where “a shipping casualty” has occurred “on or near the coasts “of the United Kingdom” or has occurred elsewhere, and certain evidence is obtainable in the United Kingdom, a formal investigation of the circumstances may be held.”² It has been held that a casualty occurring 20 miles from the coast is not within the meaning of the words “on or near the coasts “of the United Kingdom,” and it is probable that their application is confined to the limits of the territorial waters.³ The investigation may be preceded by a preliminary inquiry of an informal nature held either by an inspecting officer of the coastguard, a chief officer of customs, or by a person appointed by the Board of Trade, for which purpose the person holding it has the powers of a Board of Trade inspector under the Act.⁴ The formal investigation itself may be initiated by the person authorised to make the preliminary inquiry, either where it appears requisite or expedient to him, whether he has held a preliminary inquiry or not, or in any case where the Board of Trade so directs.⁵ The formal investigation may be conducted either by a Court of summary jurisdiction, or, if the Board of Trade so directs, by a

¹ 57 & 58 Vict. c. 60.

Sec. 464.

² *The “Fulham,”* 1898, P. 206; 1899, P. (C.A.) 251.

⁴ Sec. 465. See *infra*, p. 316.

⁵ Sec. 466 (1).

Wreck Commissioner, in which case the powers of the Court are similar to those of a Court of summary jurisdiction.⁶ The Court sits with assessors possessing nautical, engineering, or other special skill or knowledge.⁷ Where it appears probable that the investigation will involve any question regarding the cancellation or suspension of an officer's certificate, the Court sits with not less than two assessors having experience in the merchant service, and a certificate cannot be cancelled or suspended without the concurrence of at least one of the assessors.⁸ In Scotland the investigation is usually conducted by the Sheriff, who for that purpose is invested with all the powers which he possesses in exercise of his ordinary jurisdiction.⁹ It is the duty of the person who has held the preliminary inquiry and has applied to a Court to hold formal investigation to superintend the management of the case and to render such assistance to the Court as is in his power.¹⁰ In the majority of cases he is the representative of the Board of Trade, and the case is in effect managed by the Board.

Character of the Investigation.—The investigation has usually a dual character. Its primary purpose is to investigate, in the interests of the public, the circumstances in which the casualty has occurred, but this may, and generally does, involve an inquiry into the conduct of the persons concerned in the navigation of the ship. In the course of the investigation charges may therefore be made against any individual who is responsible for the casualty, and if the person thus charged is a certificated officer the Court has the power of cancelling or suspending his certificate if it appears that he is guilty of "wrongful act or default." The power, however, of cancelling or suspending a certificate does not arise merely because a "shipping casualty" has been caused by the wrongful act or default of an officer, but only in cases where "the Court finds "that the loss or abandonment of or serious damage to any ship "or loss of life has been caused by his wrongful act or default."¹¹ Where in the course of the investigation a charge is made against any person the proceedings, in addition to their primary character of an investigation, acquire a penal char-

⁶ Sec. 466¹(2).

⁷ Sec. 466¹(3).

⁸ Sec. 470 (1) (a).

⁹ Sec. 466 (10).

¹⁰ Sec. 466 (5).

¹¹ Sec. 470 (1) (a); *Ex parte Storey*, 1878, 3 Q.B.D. 166.

acter, and the Board of Trade has power to remit the investigation to the Lord Advocate "to be prosecuted in such manner " as he may direct."¹²

Procedure.—Procedure is regulated by the Shipping Casualties Appeals and Rehearings Rules, 1923. The Board of Trade and the owner, the master, and all persons who, in the opinion of the Board of Trade, ought to be served with notice of the investigation, are deemed to be parties to the proceeding.¹³ Parties may be represented by agents or by counsel and agents. Where a King's Counsel is present he should be accompanied by a junior.¹⁴ The notice requires to contain a statement of the questions which the Board intend to raise on the hearing of the investigation.¹⁵ In the conduct of the investigation the Board of Trade occupies a special position, which is neither that of a prosecutor or of a neutral. "The Board of " Trade represents the public in this matter. It has a duty " also to those who are concerned—the master, the owner, and " others—which it is desirable properly to discharge,"¹⁶ and, similarly, it has been observed that "it is clear that the " Board of Trade are not in the position of a prose- " cutor or in the position of a neutral, but in the " position of a body having special opportunities of knowing " what is right and what is wrong, whose duty it is to assist the " Court, after the evidence, in coming to a right conclusion."¹⁷ The evidence of the Board of Trade is led first, after which they are required to state in open Court the questions on which the opinion of the Court is desired.¹⁸ At this stage it is the duty of the Board of Trade to assist the Court by stating whether, in their opinion, the certificate of an officer should be dealt with. "At the close of the inquiry the Board " of Trade has to determine upon the line of conduct it will " pursue, because, if it simply leaves the matter to the magis- " trate instead of giving the magistrate its views on the matter, " it leaves the magistrate entirely at large and without, it " seems to me, the full assistance that can be given to him."¹⁹

¹² Sec. 466 (13).

¹³ Rules 3, 4.

¹⁴ Minutes of the Faculty of Advocates, 7th February, 1907.

¹⁵ Rule 3.

¹⁶ *The "Carlisle,"* 1906, P. 301, the President, at 314.

¹⁷ *The "Carlisle," supra*, Bargrave Deane, J., at 316.

¹⁸ Rules 11, 12.

¹⁹ *The "Carlisle," supra*, the President, at 315.

From this moment, if a charge is made, the person charged with the offence is in the position of a defender. The person charged and the other parties to the investigation are then entitled to address the Court and to lead evidence,²⁰ and after the whole of the evidence has been concluded any of the parties who desire to do so may address the Court upon it, and the Board of Trade may address the Court in reply on the whole case.²¹ So far as applicable, the ordinary rules of procedure are followed. Thus, failure by the Board of Trade to lead primary evidence may lead to the decision of the Court being reversed on appeal to the Court of Session.²²

Opportunity of Defence.—It is provided that the investigation shall be “conducted in such manner that if a charge is “made against any person, that person shall have an opportunity of making a defence.”²³ This involves the right of receiving precise notice of the nature of the charge made and of being examined upon it. Thus, when a master’s certificate had been suspended on the ground that he had improperly failed to verify his position on the chart, and he had not been examined on this point, and had had no notice of the nature of the case brought against him, the decision of the Court was reversed.²⁴ Similarly, where a master’s certificate had been suspended on the ground that he had failed to give proper directions to the officer of the watch and he had not been examined on this point, the decision was also reversed, it being held that it was improper to draw inferences from the evidence of other people on matters on which the master himself had the most intimate knowledge.²⁵ Again, where a master had merely received notice to appear before the Court appointed “to “inquire into the causes which led to the casualty “and into all the facts connected therewith,” and his certificate had been suspended on the ground of error of judgment, it was held that he had had no proper notice of the charge made against him and no opportunity of making a defence, and that, accordingly, an elementary principle of justice had been violated.²⁶ The right

²⁰ Rule 12.

²¹ Rule 13.

²² *Turner v. Board of Trade*, 1894, 22 R. 18.

²³ Sec. 466 (11).

²⁴ *Turner v. Board of Trade*, *supra*.

²⁵ *Watson v. Board of Trade*, 1892, 19 R. 1078.

²⁶ *The “Chelston,”* 1920, P. 400.

of making a defence appears to involve also the right of being represented by counsel or agent and of calling witnesses. Regarding the corresponding provision in the case of inquiries held by a local marine board or by a person appointed by the Board of Trade²⁷ where the words used are "an opportunity of making his defence either in person or otherwise,"¹ it has been observed that "proceedings of this kind, which are penal, if not criminal, should be as public as possible. Those who conduct such an inquiry should give the party charged every opportunity of having his attorney and counsel and witnesses present."²

Where a question of the cancellation or suspension of a certificate is involved, the Court is required to state in open Court at the conclusion of the case, or as soon after as practicable, the decision which they have come to regarding it.³ In all cases the Court is required to send a full report of the case, along with the evidence, to the Board of Trade, and, if they have determined to cancel or suspend a certificate, to forward the certificate therewith.⁴ It is not necessary, although customary, for the Court to state the reasons for the decision which it has given in open Court, and the Court may therefore in its report to the Board of Trade state reasons for its finding which do not appear in its decision.⁵

"Wrongful Act or Default."—The grounds for cancelling or suspending a certificate are the "wrongful act or default" of the holder causing "the loss or abandonment of or serious damage to any ship or loss of life."⁶ An error of judgment does not in itself constitute wrongful act or default if not inconsistent with the rules of good seamanship, as where a master has set a wrong course in waters for which there are no sailing directions,⁷ or where the error of judgment is made at a moment of great difficulty and danger.⁸ But an error of judgment due to unreasonable panic is sufficient reason for cancellation or suspension, as where an officer has neglected to close the watertight bulkheads and man the pumps when the ship is in danger

²⁷ See *infra*, p. 316.

¹ Sec. 471 (3) (c).

² *Reg. v. Collingridge*, 1864, 34 L.J. Q.B. 9, Crompton, J., at 11.

³ Sec. 470 (2).

⁴ Sec. 470 (3).

⁵ *The "Kestrel"*, 1881, 6 P.D. 182.

⁶ Sec. 470 (1) (a).

⁷ *Watson v. Board of Trade*, 1884, 22 S.L.R. 22.

⁸ *The "Fammoth"*, 1882, 7 P.D. 207.

of sinking.⁹ Neglect of an obvious duty is also sufficient ground, such as failure to remain on the bridge when in control of the navigation,¹⁰ or negligence in shipping improper ballast by which the ship is endangered.¹¹ Faults of a minor character are sufficiently dealt with by reprimand.¹²

Expenses of the Investigation.—The judge may order the expenses of the investigation to be paid in whole or in part by the Board of Trade “or by any other party.”¹³ Expenses are on occasion used as a method of penalising an officer short of dealing with his certificate. Thus, if his fault is slight or he has previously had a good record, he may be merely reprimanded and ordered to pay a portion of the expenses.

Re-hearing.—In their discretion the Board of Trade may order the case to be reheard either generally or as to any part thereof, and they “shall” do so if new and important evidence, which could not be produced at the investigation, has been discovered, or if they have reason to believe that “miscarriage of justice has taken place.”¹⁴ It has been held that the term “shall” is imperative if new and important evidence, which could not be produced at the investigation, has been discovered. In England if the Board refuse a rehearing in cases to which the imperative portion of the provision applies a *mandamus* may be issued against them.¹⁵ In Scotland the procedure to be followed in such circumstances has never been determined. It is thought, however, that an action might be raised against the Board of Trade by the person aggrieved by their refusal for a declarator that the pursuer is entitled to have his rights re-established and that the Board should be ordained to order the case to be reheard for that purpose.¹⁶ The rehearing may take place, as the Board of Trade may direct, either before the Court by which the case was heard in the first instance, or before the Wreck Commissioner or before the Senior Lord Ordinary, or any other judge of the Court of Session, whom the Lord President may appoint for the purpose.¹⁷

⁹ *Brown v. Board of Trade*, 1890, 18 R. 291.

¹⁰ *Ewer v. Board of Trade*, 1880, 7 R. 835.

¹¹ *The “Golden Sea,”* 1882, 7 P.D. 194.

¹² *Brater v. Board of Trade*, 1889, 27 S.L.R. 35.

¹³ Rule 16.

¹⁴ Sec. 475 (1).

¹⁵ *The “Ida,”* 1886, 11 P.D. 37.

¹⁶ Cf. *Wm. Denny & Bros. v. Board of Trade*, 1880, 7 R. 1019.

¹⁷ Sec. 475 (2).

Appeal.—The dual character of the proceedings appears also in the provisions for appeal. In so far as they are devoted to an investigation of the casualty no appeal is permitted, but where “a decision has been given with respect to the cancelling “or suspension of the certificate of a master, mate, or engineer, “and an application for a rehearing under this section has not “been made or has been refused,” an appeal lies to either Division of the Court of Session.¹⁸ It has been further provided that, if an application for a rehearing has not been made or has been refused, the owner of the ship or any other person who has an interest in the investigation and has appeared at the hearing and is affected by the decision of the Court may appeal from the decision in the same manner as a master may appeal against a decision cancelling or suspending his certificate.¹⁹ Prior to this provision it had been held that an owner had no right of appeal even in cases where he had been found liable in expenses.²⁰ Procedure is by a note of appeal. The questions put to the Court of Investigation and the answers thereto should be submitted to the Court, and the note should conclude for recall of the decision in so far as the appellant has been found in fault and for expenses. The appendix should contain the report of the Court to the Board of Trade, the notes of evidence, and the documents founded on.^{20a} The appeal is in no sense a rehearing, and the Court is “not at liberty to enter upon a “general inquiry as to all that is in the report and the various “matters and questions which were there gone into, except so “far as they bear, or the evidence given with respect to them “bears, whether directly or indirectly upon the question upon “which alone an appeal to this Court lies.”²¹

Procedure in Rehearings and Appeals.—Procedure in rehearings and appeals is regulated by the Shipping Casualties and Appeals Rehearings Rules, 1923.²² The Court has power to receive fresh evidence on appeals or rehearings,²³ but applications for leave to lead such evidence should be made before the hearing of the appeal.²⁴ In so far as applicable, the ordinary rules of procedure of an Appeal Court are followed, both

¹⁸ Sec. 475 (3).

¹⁹ Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), sec. 66.

²⁰ *The “Golden Sea,”* 1882, 7 P.D. 194.

^{20a} Rule 20 (g).

²¹ *The “Carlisle,”* 1906, P. 301, the President, at 307.

²² Rules 19-21.

²³ Rule 20 (b).

²⁴ *The “Famenoth,”* 1882, 7 P.D. 207.

in a rehearing and in an appeal.²⁵ It appears, therefore, that the Court may not only affirm or reverse the decision reheard or appealed against, but may vary it. Thus a cancellation may be reduced to a suspension.

Expenses of Appeal.—The Court of Appeal may make such order as to the whole or any part of the expenses of or occasioned by the appeal as it may think just.¹ Where a decision dealing with a certificate is affirmed, but the Court of Appeal recommend that the period for which it has been suspended should be reduced, no expenses have been found due to or by either party.² If the Board of Trade appears in order to oppose an appeal which proves to be successful they will be found liable in the expenses of the appeal,³ but they will not be so found liable, even where the action of the Court below in suspending a certificate has proceeded on their invitation, if the Court of Appeal is of opinion that the successful appellant has been "guilty of such misconduct as rendered an inquiry "as to the suspension of his certificate reasonable."⁴ Where the Board of Trade has declined to express an opinion whether a certificate should be dealt with or not, and the Court has found *ex proprio motu* that it should be dealt with, and this decision is reversed by the Court of Appeal, the Board of Trade will be liable in the expenses of the appeal, since they have neglected the duty which lies upon them to guide the Court as to the line which the investigation should take and not to leave it at large.⁵

²⁵ *The "Kestrel,"* 1881, 6 P.D. 182; rule 20, 21.

¹ Rule 20 (1).

² *The "Kestrel," supra.*

³ *The "Famemoth," supra.*

⁴ *The "Arizona,"* 1880, 5 P.D. 123, Sir Robert Phillimore, at 130.

⁵ *The "Carlisle,"* 1906, P. 301.

CHAPTER II.

COURT OF INQUIRY (BOARD OF TRADE INQUIRY).

Circumstances in which a Court of Inquiry may be held.—It is usual for questions regarding the conduct of certificated officers and the suspension or cancellation of their certificates to arise with reference to shipping casualties and to be dealt with in the course of the formal investigation of the casualty as detailed in the preceding chapter. It is, however, competent for the conduct of certificated officers to be inquired into and their certificates suspended or cancelled independently of such investigations. Thus, the Board of Trade may itself *ex proprio motu* suspend or cancel a certificate if it is shown that the certificated officer has been guilty of any "offence."¹ The opinion has been expressed that the term "offence," as here used, is confined to criminal offence punishable by fine or imprisonment, and does not mean an offence arising from incompetence or other similar cause.² Apart, however, from the occurrence of a shipping casualty, and from the powers of the Board of Trade in the case of "offences," it is provided that "if the Board of Trade, either on the report of a local "marine board or otherwise, have reason to believe that any "master, mate, or certificated engineer is from incompetency or "misconduct unfit to discharge his duties, or that in a case of "collision he has failed to render such assistance or give such "information as is required under the Fifth Part of this Act, "the Board may cause an inquiry to be held."³ Where such an inquiry is held, the grounds on which the power of cancellation or suspension may be exercised are somewhat different to what they are in cases where the inquiry takes place in the course of a formal investigation, since the power may be exercised, provided that the Court finds that the certificated officer is "incompetent or has been guilty of any gross act of misconduct, "drunkenness, or tyranny, or that in a case of collision he has "failed to render such assistance or give such information as is

¹ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 469.

² *Board of Trade v. Leith Local Marine Board*, 1896, 24 R. 177, Lord Trayner, at 182.

³ Sec. 471 (1).

“ required under the Fifth Part of this Act.”⁴ The Board of Trade may either themselves directly appoint a person to hold the inquiry, or may direct the nearest convenient local marine board, or, in cases where there is no local marine board convenient or where it is unwilling to act, may direct a Court of summary jurisdiction to hold the inquiry.⁵ In Scotland local marine boards are situated at Aberdeen, Dundee, Glasgow, Greenock, and Leith.

(a) **Inquiry by Local Marine Board or by Person appointed by Board of Trade.**—Where the inquiry is held by a local marine board or by a person appointed by the Board of Trade, the proceedings are less formal than where it is held by a Court of summary jurisdiction. The Act provides that such an inquiry shall be held with the assistance of a local stipendiary magistrate, or, if no such magistrate is available, with the assistance of a competent legal assistant appointed by the Board of Trade. The tribunal thus constituted has all the powers of a Board of Trade inspector under the Act, and an opportunity requires to be given to the officer whose conduct is the subject of the inquiry of making a defence “ either in person or otherwise.”⁶ The powers of a Board of Trade inspector include, *inter alia*, that of citing witnesses, enforcing the production of documents, and the administration of oaths.⁷ Under the powers thus conferred the tribunal may summon witnesses for the defence, but since the expenses of such witnesses are borne by the public, and they are the witnesses not of the defender but of the Court, the Court should, before citing them, satisfy itself that their evidence is likely to be relevant. The words “ or otherwise ” appear to mean by counsel or agent.⁸ Since the tribunal has the power of administering an oath, false swearing by witnesses amounts to perjury.⁹ A local marine board is a Court within the meaning of sec. 470 (1) (b), and, accordingly, has the power of cancelling or suspending a certificate.¹⁰ The tribunal may make such order as to expenses as it thinks just, and is required to send a report of the case to the Board of Trade.¹¹

⁴ Sec. 471 (1).

⁵ Sec. 471 (2).

⁶ Sec. 471 (3).

⁷ Sec. 729.

⁸ *Reg. v. Collingridge*, 1864, 34 L.J. Q.B. 9.

⁹ *Reg. v. Tomlinson*, 1866, 1 C.C.R. 49.

¹⁰ *Board of Trade v. Leith Local Marine Board*, 1896, 24 R. 177.

¹¹ Sec. 471 (3).

(b) **Inquiry by a Court of Summary Jurisdiction.**—In cases where the inquiry is held by a Court of summary jurisdiction the Court has the same powers and proceeds in the same manner and subject to the same rules as in the case of an investigation into a shipping casualty, with the exception that the Board of Trade may direct the person who originally brought the charge against the certificated officer to their notice to conduct the case himself.¹² Where the Board of Trade itself conducts the case and indicates at the conclusion of the evidence that it has no charge to make, the Court may nevertheless proceed with the inquiry, since any other course would amount to delegation of its proper judicial functions to the Board of Trade.¹³

Rehearings and Appeals.—Rehearings and appeals are permitted subject to the same conditions and rules as in the case of investigations of shipping casualties.¹⁴

¹² Sec. 471 (4).

¹³ *Ex parte Minto*, 1877, 35 L.T.R. 808.

¹⁴ Shipping Casualties and Appeals and Rehearings Rules, 1923, rules 20, 21.

CHAPTER III.

NAVAL COURT.

Jurisdiction and Constitution of Court.—On foreign stations of His Majesty's ships Naval Courts may be summoned for the purposes of trying complaints by the officers and seamen of any British ship; of preserving the interest of the owners of any British ship or of its cargo; and of investigating shipping casualties.¹ The powers of such Courts include, *inter alia*, the removal of the master, and, if the consignee of the ship consents, the appointment of a successor, the cancellation or suspension of an officer's certificate, the discharge of a seaman, and the determination of questions of payment or forfeiture of wages, and of questions concerning certain offences against the Merchant Shipping Act, 1894. The Court may, for these purposes, if it thinks fit, order a survey of any ship which is the subject of investigation.² The Court may be convened "by any officer in command of any of His Majesty's ships on any foreign station, or, in the absence of such an officer, by any consular officer."³ It is composed of not more than five or less than three members, drawn from officers in His Majesty's naval service, consular officers, masters of British ships, or British merchants, but "the master or consignee of the ship to which the parties complaining or complained against belong" are not eligible.⁴ It has been held that a consular officer who has victualled the ship is not thereby debarred from being a member of the Court, and the finding of the Court is not thereby rendered void either under the terms of the Act or at common law.⁵

Powers.—The Court has the power of administering oaths, of summoning parties and witnesses, and of compelling their attendance, and the production of documents.⁶ No rules of

¹ Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 480.

² Secs. 471 (1) (c), 483.

³ Sec. 480.

⁴ Sec. 481.

⁵ *Middlemas v. s.s. "Mersario" Co., Ltd.*, 1912, 2 S.L.T. 448.

⁶ Sec. 482 (2).

procedure have been formulated, and procedure is essentially informal and in the discretion of the Court.

The Court may punish offences against the Merchant Shipping Act, which are punishable on summary conviction, and for this purpose has all the powers which a Court of summary jurisdiction would have if the case were tried in the United Kingdom.⁷ Its powers of punishment, however, are not limited to those of a Court of summary jurisdiction for the same offence, but, where the circumstances of the case demand, it may exercise in addition all the powers conferred upon it by the Act in so far as applicable to the circumstances of the case. Thus, it may discharge a seaman for offences against discipline where his retention would be a menace to the discipline of the ship, even although a Court of summary jurisdiction would not have such a power.⁸

Status.—The Court is a British Court sitting by virtue of the authority of a British statute and administering British law,⁹ and all orders duly made by it are conclusive in any subsequent legal proceedings as to the rights of the parties.¹⁰ Its decisions cannot be impugned on the ground of error in law, provided that the proceedings are regular, and are as final and conclusive as regards the matter disposed of as those of a Court of record whether the persons concerned in the subsequent legal proceedings are the master, owners, or seamen.¹¹

Right of Defence.—Any person against whom any complaint or charge is made has an opportunity of making a defence,¹² which, in questions of cancellation or suspension of the certificate of an officer, includes the right of being previously furnished with a copy of the report or statement of the case on which the Court proceeds.¹³ Failure to comply with this provision, however, merely voids any cancellation or suspension which may have taken place, and does not render the proceedings of the Court fundamentally null. Accordingly, a decision given in such circumstances whereby a certificate is cancelled remains in force as a discharge, or at least as the operative cause of the discharge, of the officer in his capacity of seaman,

⁷ Sec. 483 (1) (h).

⁸ *Hutton v. Ras S.S. Co., Ltd.*, 1907, 1 K.B. 834.

⁹ *Hutton v. Ras S.S. Co., Ltd.*, *supra*, Lord Alverstone, L.C.J., at 838.

¹⁰ Sec. 483 (2).

¹¹ *Hutton v. Ras S.S. Co., Ltd.*, *supra*, the President, at 843.

¹² Sec. 482 (1).

¹³ Sec. 470 (4).

and, accordingly, no civil action for wages or damages for wrongous dismissal lies against the owner.¹⁴

Expenses of the Inquiry.—The Court may order costs of the proceedings “before them, or any part of those costs, to “be paid by any of the parties thereto, and may order any “person making a frivolous or vexatious complaint to pay compensation for any loss or delay caused thereby; and any costs “or compensation so ordered to be paid shall be paid by that “person accordingly, and may be recovered in the same manner “in which the wages of seamen are recoverable, or may, if the “case admits, be deducted from the wages due to that “person.”¹⁵

Report to Board of Trade.—The Court is required to report to the Board of Trade, and such report is admissible in evidence in the manner provided by the Merchant Shipping Act.¹⁶

Right of Appeal.—The Scottish Courts have no appellate jurisdiction. In cases where a decision has been given with respect to the cancelling or suspension of a certificate,¹⁷ or questions of wages, fines, or forfeitures are involved, any person aggrieved by an order or decision of the Court has a right of appeal to the High Court in England, jurisdiction being exercised by a Divisional Court of the Probate, Divorce, and Admiralty Division, and on such appeal the High Court may enforce, quash, or vary the order or decision appealed against.¹⁸ Where an order is thus varied on appeal it is as conclusive as to the rights of the parties in any subsequent legal proceedings as if it were the original order of the Naval Court.¹⁹ A finding by which a seaman is discharged is one which involves indirectly a question of wages and directly one of forfeiture, and is therefore appealable.²⁰

¹⁴ *Middlemas v. s.s. "Mersario" Co., Ltd.*, 1912, 2 S.L.T. 448.

¹⁵ Sec. 483 (1) (k).

¹⁶ Sec. 484.

¹⁷ Sec. 475 (3).

¹⁸ Merchant Shipping Act, 1906 (6 Edw. VII. c. 48), sec. 68 (1); Rules of the Supreme Court (Merchant Shipping), 1894, rule 1.

¹⁹ Merchant Shipping Act, 1906, sec. 68 (2).

²⁰ *Middlemas v. s.s. "Mersario" Co., Ltd.*, 1912, 2 S.L.T. 448.

CHAPTER IV.

COURT OF SURVEY.

Jurisdiction of the Court.—The safety of vessels at sea is under the general control of the Board of Trade, for which purpose they may issue regulations and grant certificates that these have been complied with. The duty of enforcing the regulations rests, in the first instance, on the Board of Trade surveyors, on whose declarations the certificates are granted or refused. In cases where the owner or master of a ship is aggrieved by the declaration of a surveyor, or by the refusal of a certificate, he may appeal to the Court of Survey for the port or district within which the vessel is situated.¹ In certain other cases also a Court of Survey has jurisdiction. Thus, where a ship has been provisionally detained under the powers conferred by sec. 459 of the Merchant Shipping Act, 1894, the owner or master may appeal to the Court of Survey for the port or district where the ship is detained, and the Board of Trade may at any time, if they think it expedient, themselves refer the matter to the Court of Survey for the port or district where the ship is detained.²

Constitution.—A Court of Survey is composed of a judge sitting with two assessors “of nautical engineering or other “special skill and experience.”³ The judge is selected from a list approved for the port or district by the Secretary of State, the list being in Scotland drawn from the Wreck Commissioners *ex officio* and the Sheriffs and Sheriffs-Substitute of the counties where the port or district is situated. The Registrar of the Court is the Sheriff-clerk of the county in which the Court is held, and the Registrar’s office is the office of the Sheriff-clerk.⁴ In any special circumstances in which the Board of Trade thinks it expedient a Wreck Commissioner may be appointed as judge.⁵

¹ Cf. Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), secs. 275, 318, 420; Merchant Shipping (Convention) Act, 1914 (4 & 5 Geo. V. c. 50), sec. 19.

² Merchant Shipping Act, 1894, sec. 459 (1) (d) (f).

³ Sec. 487.

⁴ Rules of the Court of Survey, 1876, Appendix A.

⁵ Sec. 487 (2).

Procedure.—The appeal is heard in open Court, and the judge, either himself or together with the assessors, may inspect or survey the ship, or may appoint any competent person to do so and report thereon. He has the same power as the Board of Trade to order the ship to be released or finally detained, and is required to render a report to the Board of Trade.⁶ Procedure is regulated by the Rules of the Court of Survey, 1876. The Board of Trade and the appellant are both parties to the proceeding, and any other person who enters appearance and obtains the permission of the judge.⁷ It has been pointed out that the surveyor acts under the direction of the Board of Trade and is their servant, and, accordingly, that in an appeal the Board of Trade are equally in the position of a respondent with the surveyor, and must justify their instructions to him.⁸ At the hearing the Board of Trade first call their witnesses, and are then required to state in writing what order they require the Court to make. The complainant, *i.e.*, any person on whose complaint the survey has been made, then calls his witnesses, and states in writing what order he requires the Court to make. The appellant then calls his witnesses, and states in writing what order he requires the Court to make. After the appellant has examined all his witnesses, the Board of Trade and the complainant may on cause shown call further witnesses in reply. After all the witnesses have been examined the Court first hears the appellant, then the complainant, if any, and afterwards the Board of Trade.⁹ As soon as possible after the Court has come to a decision the judge is required to issue an order for the release or detention of the ship, either finally or on conditions.¹⁰

Expenses.—The Court may, if the parties consent thereto in writing, decide whether expenses or expenses and damages are due and to and from whom, and may assess the amount thereof; or the parties may by consent in writing refer the question to the Wreck Commissioner.¹¹

Scientific Referees.—Where questions “of construction or “design or of scientific difficulty or important principle”

⁶ Sec. 488 (5); rule 31.

⁷ Rules 17, 18.

⁸ *Wm. Denny & Bros. v. Board of Trade*, 1880, 7 R. 1019, Lord President, at 1025.

⁹ Rules 23-27.

¹⁰ Rule 30.

¹¹ Rule 32.

require to be determined, the Board of Trade may refer the appeal to one or more specially qualified referees, and are bound to do so if the appellant requires it and finds security for expenses. The referee or referees have the same powers as a judge of the Court of Survey.¹² The decision of the Court of Survey or of the scientific referees is final.

Jurisdiction of Court of Session : (a) Equitable.—In cases where the Board of Trade, either directly by its regulations or indirectly through its servants the surveyors, has exceeded its statutory powers, the equitable jurisdiction of the Court of Session may be invoked. It has been observed that “the Board of Trade is part of the executive government of the country, and in matters of this kind its functions are purely executive and its powers derived solely from statute. If, therefore, it is made out that the Board of Trade have exceeded their powers, the pursuers are quite entitled to come to this Court to have them restrained. It is not a question of excess of jurisdiction, but of excess of administrative functions. But this Court have power to restrain administrative bodies as well as judicial bodies in the exercise of their functions.”¹³ It is probable also that the Court of Session possesses an equitable jurisdiction where the Board of Trade or their servants have acted in any degree in an oppressive, unnecessary, or capricious manner, even if they have not exceeded their statutory powers; but a strong case of such action requires to be established, since it has been observed that the accumulated experience of the Board has furnished it with the best possible data regarding all the regulations which should be issued.¹⁴ Procedure in applications to the Court of Session is by action of declarator that the Board of Trade has exceeded its powers.¹⁵

(b) Ordinary.—In exercise of its ordinary judicial functions the Court of Session has power to interpret the technical provisions of the Merchant Shipping Act regarding the survey of ships, such as those concerned with the measurement and tonnage of ships, and within the limits of its jurisdiction the power of the Sheriff Court is, of course, similar. In such cases, however, the Court will be slow to interfere with

¹² Sec. 490.

¹³ *Wm. Denny & Bros. v. Board of Trade*, *supra*, Lord President, at 1023.

¹⁴ *Wm. Denny & Bros. v. Board of Trade*, *supra*, Lord Ordinary, at 1021.

¹⁵ *Wm. Denny & Bros. v. Board of Trade*, *supra*.

the judgment and discretion of surveyors, and, where technical evidence is required, will generally prefer to remit to a skilled person, such as a Lloyd's surveyor, to report on the facts in preference to allowing a proof, even where a proof has been asked for by one of the parties. The Court, however, is in no way bound by such reports, and will exercise its judgment independently.¹⁶ In questions of this nature the Court of Survey will, of course, be guided by its decisions.

¹⁶ *Lord Advocate v. Clyde Steam Navigation Co.*, 1873, 11 M. 440; *Leith, Hull, and Hamburg Steam Packet Co. v. Lord Advocate*, 1873, 11 M. 597.

SCOTTISH MARITIME PRACTICE.

APPENDIX I.

STATUTES.

ACT 1681, c. 82,

Concerning the jurisdiction of the Admiral Court.

Our Sovereigne Lord considering that the clearing and establishing the jurisdiction of the high Admiral of this kingdom will greatly tend to the advancement and encouragement of trade and navigation. Therefore His Majestie with advice and consent of the estates of Parliament doeth ratifie and approve the 15 Act of the 20 Parliament of King James the Sixth in the whole heads clauses and articles of the same, and decernes and declares the high Court of Admiralty to be a soveraigne judicature in itself and of its own nature to import summar execution. And statuts and declares that the said High Admiral as he is his Majesties Leivetenent and Justice General upon the seas and in all ports harbours or creiks of the same and upon fresh waters or navigable rivers below the first bridges or within the flood marks so far as the same does or can at any time extend: so the said High Admiral hath the sole priviledge and jurisdiction in all maritim and sea-faring causes forreigne and domestick whether civil or criminal whatsoever within this realme and over all persons as they are concerned in the same. And prohibits and discharges all other judges to medle with the decision of any of the saids causes in the first instance except the great admiral and his deputs allenerlie. And statuts ordains and declares that it is the priviledge of the said High Admiral to cause parties become enacted and find caution not only for compearance but for performance of the acts and sentences of his court, and that he may punish all breakers of his arreistments and resisters of his officers in the execution of his precepts and apply the fynes and amerciaments to his own use conform to the laws of the kingdom. And farther statuts and declares that the high Court of Admiraltie is a Supream Court and that the decreits and acts of all other inferiour Courts of Admiraltie are subject to the review and reduction of the said High Court of Admiraltie. And for the more ready and quick dispatch of justice in maritim and sea-faring causes forreign and domestick whether civil or criminal within this realme and over all persons in so far as they are concerned in the same both to natives and strangers Our Sovereigne Lord with advice and consent foresaid prohibits and discharges all advocations in the foresaids causes from the said Court of Admiralty to the

Lords of Session or any other judges whatsoever in all time coming, and that no suspension or other stop to the execution of the decreits or acts of the said Court of Admiralty be past be the Lords of Session at any time hereafter except by the whole Lords *in praesentia* in time of Session and by three of the saids Lords the time of vaccance met together to that effect: And if any suspensions or stops shall happen to be past in manner foresaid the same be summarlie discussed upon a bill and be privileged and exeemed from the ordinary course of the Roll; And if upon discussing thereof the same shall be found to have been unjustly and maliciously raised that the said High Court of Admiralty may upon the application made by the parties concerned modify and decern the damages they have sustained by the saids suspensions and stops of execution of their acts and decreets attour the expenses of plea before the Lords of Session which is to be modified by the saids Lords of Session. As also his Majestie with advice and consent foresaid statuts and ordains that it shall be lawful and competent to the said Court of Admiralty to review their own decreets and sentences if ther be just occasion for the same. . . . And his Majestie with advice and consent foresaid casses annulls and rescinds all and whatsoever laws acts of Parliament or customs contrary to or any ways inconsistent with this present Act.

COURT OF SESSION ACT, 1830.

1 Will. IV. c. 69.

21. And whereas all maritime causes may now be brought by Review before the Court of Session and many causes formerly heard and determined by the High Court of Admiralty are now remitted to the Jury Court: . . . And whereas it has become unnecessary and inexpedient to maintain any separate Court for Maritime or Admiralty Causes; be it therefore enacted that the High Court of Admiralty be abolished and that hereafter the Court of Session shall hold and exercise original Jurisdiction in all Maritime Civil Causes and Proceedings of the same Nature and Extent in all respects as that held and exercised in regard to such Causes by the High Court of Admiralty before the passing of this Act; and all applications of a summary Nature connected with such causes may be made to the Lord Ordinary on the Bills: . . .

22. The Sheriffs of Scotland and their substitutes shall, within their respective sheriffdoms, including the navigable rivers, ports, harbours, creeks, shores, and anchoring grounds, in or adjoining such sheriffdoms, hold and exercise original jurisdiction in all maritime causes and proceedings, civil and criminal, including such as may apply to persons residing furth of Scotland, of the same nature as that heretofore held and exercised by the High Court of Admiralty.

23. . . . the finding of caution and using of arrestment heretofore observed in the High Court of Admiralty and all regulations relative thereto may be enforced in the foresaid

courts respectively; and maritime causes may be heard and determined by the Sheriff according to the same modes and rules which are applicable in the Sheriff Court to causes not maritime . . . and the sentences interlocutors and decrees pronounced by Sheriffs in maritime causes shall be subject to review by the Courts of Session and Justiciary respectively in the same way and manner in which sentences interlocutors and decrees of Sheriffs in similar causes not maritime are subject to review at present, and not otherwise. . . .

25. . . . from and after the commencement of this act the Office of the Judge Admiral shall be and the same is hereby abolished as also the Offices of all clerks and officers belonging to that Court. . . .

27. The sheriff-clerks of the several counties of Scotland shall respectively act as clerks to the Sheriffs in maritime causes: Provided always, that neither that officer, nor any other person appointed to any office, or acquiring right to any fees or emoluments in virtue of the provisions of this Act, shall be entitled to profer any claim to compensation in consequence of the subsequent abolition of such office or fees, or of any alteration therein.

29. All inferior Admiralty jurisdiction not dependent upon the High Court of Admiralty shall continue as heretofore, but the judgments of such Courts shall be subject to review solely in the Courts of Session and Justiciary respectively. . . .

40. Summonses in maritime . . . causes instituted in the Court of Session shall be signed by one of the Principal or Depute Clerks of Session, and it shall not be necessary that any such summons should pass the Signet or require any concurrence for the public interest. . . .

COURT OF SESSION ACT, 1838, No. 2.

1 & 2 Vict. c. 118.

29. Summonses in Admiralty causes may be raised and pass under the signet in like manner as other summonses before the Court of Session now do.

COURT OF SESSION ACT, 1850.

13 & 14 Vict. c. 36.

24. The granting of bonds *de damnis et impensis* by the pursuer, and of bonds *de judicio sisti et judicatum solvi* by the defender in maritime causes before the Court of Session, shall be and the same is hereby abolished. . . .

328 CLERKS OF SESSION REGULATION ACT, 1889.

CLERKS OF SESSION (SCOTLAND) REGULATION ACT, 1889.

52 & 53 *Vict. c. 54.*

9. Section forty of the Act eleven George the Fourth and one William the Fourth, chapter sixty-nine, is hereby repealed in so far as it exempts maritime . . . causes from the ordinary fees exigible in the Court of Session, and in future the same fees shall be due and exigible in maritime . . . causes as are at present exigible in any ordinary action in the Court of Session. . . .

NAUTICAL ASSESSORS (SCOTLAND) ACT, 1894.

57 & 58 *Vict. c. 40.*

1. This Act may be cited as the Nautical Assessors (Scotland) Act, 1894, and shall apply to Scotland only.

2. In any action or proceeding in the Court of Session or in the Sheriff Court arising out of or relating to collision at sea, salvage, towage, or any other maritime matter, the court, if it thinks fit, may, and on the application of any party, shall, summon to its assistance at the trial, or at any subsequent hearing, whether on reclaiming note, appeal, or otherwise, one or more persons of nautical skill and experience, who may be willing to sit with the court and act as assessor or assessors, but, where it is proposed to summon any person as an assessor, objection to him, either personally or in respect of his qualification, may be stated by any party to the action or proceeding, and shall be disposed of by the court.

3. The judge before whom any cause is tried with the assistance of any assessor or assessors summoned under the provisions of this Act, shall make a note of the questions submitted by him to such assessor or assessors, and of the answer or answers thereto.

4. The assessors shall be appointed from a list of persons approved for the purpose, as regards the Court of Session by the Lord President, and as regards the Sheriff Court by the Sheriff of the sheriffdom. Such lists shall be published as the Lord President, or the Sheriff, as the case may be, shall direct, and shall be in force for three years only, but persons entered in any such list may be again approved in any subsequent list. It shall be lawful for the Sheriff to defer the preparation of such a list until an application has been made to summon an assessor or assessors in an action depending in one of the courts of his sheriffdom.

5. The Court of Session may, by Act of Sederunt, prescribe such rules as it shall think fit with regard to the summoning and duties of assessors under this Act, and to their remuneration, and such remuneration shall be treated as expenses in the action or proceeding, unless otherwise ordered by the Court.

6. For the hearing and determination of any appeal against

a judgment of any Scottish Court in any such action or proceeding as aforesaid, the House of Lords may, if it shall think it expedient to do so, call in the aid of one or more assessors specially qualified, and hear such appeal wholly or partially with the assistance of such assessor or assessors.

This section shall be carried into effect in pursuance of Orders made by the House of Lords.

7. The expression " Court " shall include the Lord Ordinary and either Division of the Court of Session, and the Sheriff and Sheriff-Substitute, but the expression " Sheriff " shall not include Sheriff-Substitute.

MERCHANT SHIPPING ACT, 1894.

57 & 58 Vict. c. 60.

PART I.—REGISTRY.

Transfers and Transmissions.

28.—(1.) Where the property in a registered ship or share therein is transmitted on marriage, death, bankruptcy, or otherwise to a person not qualified to own a British ship, then—

if the ship is registered in Scotland, the Court of Session;

may on application by or on behalf of the unqualified person, order a sale of the property so transmitted, and direct that the proceeds of the sale, after deducting the expenses thereof, be paid to the person entitled under such transmission or otherwise as the court direct.

(2.) The court may require any evidence in support of the application they think requisite, and may make the order on any terms and conditions they think just, or may refuse to make the order, and generally may act in the case as the justice of the case requires.

(3.) Every such application for sale must be made within four weeks after the occurrence of the event on which the transmission has taken place, or within such further time (not exceeding in the whole one year from the date of the occurrence) as the court allow.

(4.) If such an application is not made within the time aforesaid, or if the court refuse an order for sale, the ship or share transmitted shall thereupon be subject to forfeiture under this Act.

29. Where any court, whether under the preceding sections of this Act or otherwise, order the sale of any ship or share therein, the order of the court shall contain a declaration vesting in some person named by the court the right to transfer that ship or share,

and that person shall thereupon be entitled to transfer the ship or share in the same manner and to the same extent as if he were the registered owner thereof; and every registrar shall obey the requisition of the person so named in respect of any such transfer to the same extent as if such person were the registered owner.

30. Each of the following courts, namely :—

(b) in Scotland the Court of Session,

may, if the court think fit (without prejudice to the exercise of any other power of the court), on the application of any interested person make an order prohibiting for a time specified any dealing with a ship or any share therein, and the court may make the order on any terms or conditions they think just, or may refuse to make the order, or may discharge the order when made, with or without costs, and generally may act in the case as the justice of the case requires; and every registrar, without being made a party to the proceeding, shall on being served with the order or an official copy thereof obey the same.

National Character and Flag.

73.—(1.) The red ensign usually worn by merchant ships, without any defacement or modification whatsoever, is hereby declared to be the proper national colours for all ships and boats belonging to any British subject, except in the case of Her Majesty's ships or boats, or in the case of any other ship or boat for the time being allowed to wear any other national colours in pursuance of a warrant from Her Majesty or from the Admiralty.

(2.) If any distinctive national colours, except such red ensign or except the Union Jack with a white border, or if any colours usually worn by Her Majesty's ships or resembling those of Her Majesty, or if the pendant usually carried by Her Majesty's ships or any pendant resembling that pendant, are or is hoisted on board any ship or boat belonging to any British subject without warrant from Her Majesty or from the Admiralty, the master of the ship or boat, or the owner thereof, if on board the same, and every other person hoisting the colours or pendant, shall for each offence incur a fine not exceeding five hundred pounds.

(3.) Any commissioned officer on full pay in the military or naval service of Her Majesty, or any officer of customs in Her Majesty's dominions, or any British consular officer, may board any ship or boat on which any colours or pendant are hoisted contrary to this Act, and seize and take away the colours or pendant, and the colours or pendant shall be forfeited to Her Majesty.

(4.) A fine under this section may be recovered with costs . . . in the Court of Session in Scotland . . .

(5.) Any offence mentioned in this section may also be prosecuted, and the fine for it recovered, summarily, provided that :—

(a) where any such offence is prosecuted summarily, the court

imposing the fine shall not impose a higher fine than one hundred pounds; and

- (b) nothing in this section shall authorise the imposition of more than one fine in respect of the same offence.

74.—(1.) A ship belonging to a British subject shall hoist the proper national colours—

- (a) on a signal being made to her by one of Her Majesty's ships (including any vessel under the command of an officer of Her Majesty's navy on full pay), and
- (b) on entering or leaving any foreign port, and
- (c) if of fifty tons gross tonnage or upwards, on entering or leaving any British port.

(2.) If default is made on board any such ship in complying with this section, the master of the ship shall for each offence be liable to a fine not exceeding one hundred pounds.

(3.) This section shall not apply to a fishing boat duly entered in the fishing boat register and lettered and numbered as required by the Fourth Part of this Act.

75. The provisions of this Act with respect to colours worn by merchant ships shall not affect any other power of the Admiralty in relation thereto.

Forfeiture of Ship.

76.—(1.) Where any ship has either wholly or as to any share therein become subject to forfeiture under this Part of this Act,

- (a) any commissioned officer on full pay in the military or naval service of Her Majesty;
- (b) any officer of Customs in Her Majesty's dominions; or
- (c) any British consular officer,

may seize and detain the ship, and bring her for adjudication . . . before the Court of Session in Scotland . . . and the court may thereupon adjudge the ship with her tackle, apparel, and furniture to be forfeited to Her Majesty, and make such order in the case as to the court seems just, and may award to the officer bringing in the ship for adjudication such portion of the proceeds of the sale of the ship, or any share therein, as the court thinks fit.

(2.) Any such officer as in this section mentioned shall not be responsible either civilly or criminally to any person whomsoever in respect of any such seizure or detention as aforesaid, notwithstanding that the ship has not been brought in for adjudication, or if so brought in is declared not liable to forfeiture, if it is shown to the satisfaction of the court before whom any trial relating to such ship or such seizure or detention is held that there were reasonable grounds for such seizure or detention; but if no such grounds are shown the court may award costs and damages to any party aggrieved, and make such other order in the premises as the court thinks just.

Application of Part I.

91. This part of this Act shall apply to the whole of Her Majesty's dominions and to all places where Her Majesty has jurisdiction.

PART II.—MASTERS AND SEAMEN.

Mode of Recovering Wages.

165. A proceeding for the recovery of wages not exceeding fifty pounds shall not be instituted by or on behalf of any seaman or apprentice to the sea service in any superior court of record in Her Majesty's dominions, nor as an Admiralty proceeding in any court having Admiralty jurisdiction in those dominions, except:

- (i.) where the owner of the ship is adjudged bankrupt; or
- (ii.) where the ship is under arrest or is sold by the authority of any such court as aforesaid; or
- (iii.) where a court of summary jurisdiction acting under the authority of this Act, refers the claim to any such court; or
- (iv.) where neither the owner nor the master of the ship is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore.

167.—(1) The master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages as a seaman has under this Act, or by any law or custom.

(2) The master of a ship, and every person lawfully acting as master of a ship, by reason of the decease or incapacity from illness of the master of the ship, shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements or liabilities properly made or incurred by him on account of the ship as a master has for the recovery of his wages.

(3) If in any Admiralty proceeding in any court having Admiralty jurisdiction touching the claim of a master in respect of wages, or of such disbursements, or liabilities as aforesaid, any right of set-off or counter claim is set up, the court may enter into and adjudicate upon all questions, and settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and may direct payment of any balance found to be due.

Power of Courts to Rescind Contracts.

168. Where a proceeding is instituted in or before any court in relation to any dispute between an owner or master of a ship and a seaman or apprentice to the sea service, arising out of or incidental to their relation as such, or is instituted for the purpose of this section, the court, if, having regard to all the circumstances of the case, they think it just to do so, may rescind any contract between the owner or master and the seaman or appren-

tice, or any contract of apprenticeship, upon such terms as the court may think just, and this power shall be in addition to any other jurisdiction which the court can exercise independently of this section.

Application of Part II.

260. This Part of this Act shall, unless the context or subject-matter requires a different application, apply to all seagoing ships registered in the United Kingdom, and to the owners, masters, and crews of such ships, subject as hereinafter provided with respect to—

- (a) ships belonging to any of the three general lighthouse authorities;
- (b) pleasure yachts; and
- (c) fishing boats.

261. This Part of this Act shall, unless the context or subject-matter requires a different application, apply to all seagoing British ships registered out of the United Kingdom, and to the owners, masters, and crews thereof as follows; that is to say—

- (a) the provisions relating to the shipping and discharge of seamen in the United Kingdom and to volunteering into the Navy shall apply in every case;
- (b) the provisions relating to lists of the crew and to the property of deceased seamen and apprentices shall apply where the crew are discharged, or the final port of destination of the ship is, in the United Kingdom; and
- (c) all the provisions shall apply where the ships are employed in trading or going between any port in the United Kingdom and any port not situate in the British possession or country in which the ship is registered; and
- (d) the provisions relating to the rights of seamen in respect of wages, to the shipping and discharge of seamen in ports abroad, to leaving seamen abroad and to the relief of seamen in distress in ports abroad, to the provisions, health, and accommodation of seamen, to the power of seamen to make complaints, to the protection of seamen from imposition, and to discipline, shall apply in every case except where the ship is within the jurisdiction of the Government of the British possession in which the ship is registered.

265. Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is in this Part of this Act any provision on the subject which is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered.

266. This Part of this Act shall apply to an unregistered

British ship which ought to have been registered under this Act as if such ship had been registered in the United Kingdom.

PART VI.—SPECIAL SHIPPING INQUIRIES AND COURTS.

Power as to Certificates of Officers, &c.

472.—(1.) Any of the following courts, namely:—

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In Scotland the Court of Session,
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may remove the master of any ship within the jurisdiction of that court, if that removal is shown to the satisfaction of the court by evidence on oath to be necessary.

(2.) The removal may be made upon the application of any owner of the ship or his agent, or of the consignee of the ship, or of any certificated mate, or of one-third or more of the crew of the ship.

(3.) The court may appoint a new master instead of the one removed; but, where the owner, agent, or consignee of the ship is within the jurisdiction of the court, such an appointment shall not be made without the consent of that owner, agent, or consignee.

(4.) The court may also make such order and require such security in respect of the costs of the matter as the court thinks fit.

Rehearing of Investigations and Inquiries.

475.—(1) The Board of Trade may, in any case where under this Part of this Act a formal investigation as aforesaid into a shipping casualty, or an inquiry into the conduct of a master, mate, or engineer has been held, order the case to be reheard either generally or as to any part thereof, and shall do so—

- (a) if new and important evidence which could not be produced at the investigation or inquiry has been discovered; or
- (b) if for any other reason there has in their opinion been ground for suspecting that a miscarriage of justice has occurred.

(2) The Board of Trade may order the case to be reheard, either by the court or authority by whom the case was heard in the first instance, or by the Wreck Commissioner, or in Scotland by the Senior Lord Ordinary, or any other judge in the Court of Session whom the Lord President of that court may appoint for the purpose, and the case shall be so reheard accordingly.

(3) Where on any such investigation or inquiry a decision has been given with respect to the cancelling or suspension of the certificate of a master, mate, or engineer, and an application for a rehearing under this section has not been made or has been

refused, an appeal shall lie from the decision to the following courts, namely:—

- (b) If the decision is given in Scotland, to either division of the Court of Session.

(4) Any rehearing or appeal under this section shall be subject to and conducted in accordance with such conditions and regulations as may be prescribed by rules made in relation thereto under the powers contained in this Part of this Act.

PART VIII.—LIABILITY OF SHIPOWNERS.

502. The owner of a British seagoing ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:—

- (i) where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship; or
- (ii) where any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with, or secreting thereof.

503.—(1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say)—

- (a) where any loss of life or personal injury is caused to any person being carried in the ship;
- (b) where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;
- (c) where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship;
- (d) where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship;

be liable to damages beyond the following amounts; (that is to say)—

- (i) in respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods,

merchandise, or other things, an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage; and

- (ii) in respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

(3) The owner of every seagoing ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to vessels, goods, merchandise, or things as aforesaid arising on distinct occasions to the same extent as if no other loss, injury, or damage had arisen.

504. Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then the owner may apply . . . in Scotland to the Court of Session . . . and that court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the court thinks just.

505. All sums paid for or on account of any loss or damage in respect whereof the liability of owners is limited under the provisions of this Part of the Act, and all costs incurred in relation thereto, may be brought into account among part owners of the same ship in the same manner as money disbursed for the use thereof.

507. In any proceeding under this Part of this Act against the owner of a ship or share therein with respect to loss of life, the passenger lists under the Third Part of this Act shall be received as evidence that the person upon whose death proceedings are taken under this Part of this Act was a passenger on board the ship at the time of death.

508. Nothing in this Part of this Act shall be construed to lessen or take away any liability to which any master or seaman, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman, or to extend to any British ship which is not recognised as a British ship within the meaning of this Act.

509. This Part of this Act shall, unless the context otherwise requires, extend to the whole of Her Majesty's dominions.

PART IX.—WRECK AND SALVAGE.

Vessels in Distress.

510. In this Part of this Act unless the context otherwise requires—

- (1.) The expression “wreck” includes jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water.
- (2.) The expression “salvage” includes all expenses properly incurred by the salvor in the performance of the salvage services.

Procedure in Salvage.

547.—(1.) Disputes as to the amount of salvage whether of life or property, and whether rendered within or without the United Kingdom, arising between the salvor and the owners of any vessel, cargo, apparel, or wreck, shall, if not settled by agreement, arbitration, or otherwise, be determined summarily in manner provided by this Act, in the following cases, namely:—

- (a) In any case where the parties to the dispute consent;
- (b) In any case where the value of the property saved does not exceed one thousand pounds;
- (c) In any case where the amount claimed does not exceed in Great Britain three hundred pounds . . .

(2.) Subject as aforesaid, disputes as to salvage shall be determined by . . . in Scotland the Court of Session, but if the claimant does not recover . . . more than three hundred pounds . . . he shall not be entitled to recover any costs, charges, or expenses incurred by him in the prosecution of his claim, unless the court . . . certify that the case is a fit one to be tried otherwise than summarily in manner provided by this Act.

(3.) Disputes relating to salvage may be determined on the application either of the salvor or of the owner of the property saved, or of their respective agents.

(4.) Where a dispute as to salvage is to be determined summarily under this section it shall be referred and determined as follows:—

- (b) In Scotland it shall be referred to and determined by the Sheriff’s court.

548.—(1.) Disputes as to salvage which are to be determined summarily in manner provided by this Act shall—

- (a) where the dispute relates to the salvage of wreck be referred to a court . . . having jurisdiction at or near the place where the wreck is found;
- (b) where the dispute relates to salvage in the case of services rendered to any vessel or to the cargo or apparel thereof

or in saving life therefrom be referred to a court . . . having jurisdiction at or near the place where the vessel is lying, or at or near the port in the United Kingdom into which the vessel is first brought after the occurrence by reason whereof the claim of salvage arises.

(2.) Any court . . . to whom a dispute as to salvage is referred for summary determination may, for the purpose of determining any such dispute, call in to their assistance any person conversant with maritime affairs as assessor, and there shall be paid as part of the costs of the proceedings to every such assessor in respect of his services such sum not exceeding five pounds as the Board of Trade may direct.

549.—(1.) Where a dispute relating to salvage has been determined summarily in manner provided by this Act, any party aggrieved by the decision may appeal therefrom—

(a) in Great Britain, in like manner as in the case of any other judgment in an Admiralty or maritime cause of the county court or Sheriff's court, as the case may be.

552.

(3.) A receiver may release any detained property if security is given to his satisfaction, or, if the claim for salvage exceeds two hundred pounds and any question is raised as to the sufficiency of the security, to the satisfaction . . . in Scotland of the Court of Session, including any division of that court, or the Lord Ordinary officiating on the Bills during vacation.

(4.) Any security given for salvage in pursuance of this section to an amount exceeding two hundred pounds may be enforced by such court as aforesaid in the same manner as if bail had been given in that court.

556. Whenever the aggregate amount of salvage payable in respect of salvage service rendered in the United Kingdom has been finally ascertained, and exceeds two hundred pounds, and whenever the aggregate amount of salvage payable in respect of salvage services rendered elsewhere has been finally ascertained, whatever that amount may be, then, if any delay or dispute arises as to the apportionment thereof, any court having Admiralty jurisdiction may cause the same to be apportioned amongst the persons entitled thereto in such manner as it thinks just, and may for that purpose, if it thinks fit, appoint any person to carry that apportionment into effect, and may compel any person in whose hands or under whose control the amount may be to distribute the same, or to bring the same into court to be there dealt with as the court may direct, and may for the purposes aforesaid issue such processes as it thinks fit.

Jurisdiction of High Court in Salvage.

565. Subject to the provisions of this Act, the High Court, and in Scotland the Court of Session, shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the ser-

vices in respect of which salvage is claimed were performed on the high seas or within the body of any county, or partly on the high seas and partly within the body of any county, and whether the wreck in respect of which salvage is claimed is found on the sea or on the land, or partly on the sea and partly on the land.

Supplemental.

570. Any matter or thing which may be done under this Part of this Act by or to a justice of the peace, or a court of summary jurisdiction, may in Scotland be done by or to the Sheriff of the county.

PART XIII.—LEGAL PROCEEDINGS.

Jurisdiction.

684. For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed and every cause of complaint to have arisen either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be.

685.—(1.) Where any district within which any court, justice of the peace, or other magistrate has jurisdiction either under this Act or under any other Act or at common law for any purpose whatever is situate on the coast of any sea, or abutting on or projecting into any bay, channel, lake, river, or other navigable water, every such court, justice, or magistrate shall have jurisdiction over any vessel being on, or lying or passing off, that coast, or being in or near that bay, channel, lake, river, or navigable water, and over all persons on board that vessel or for the time being belonging thereto, in the same manner as if the vessel or persons were within the limits of the original jurisdiction of the court, justice, or magistrate.

(2.) The jurisdiction under this section shall be in addition to and not in derogation of any jurisdiction or power of a court under the Summary Jurisdiction Acts.

686.—(1.) Where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas or in any foreign port or harbour or on board any foreign ship to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognisance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offence as if it had been so committed.

Damage Occasioned by Foreign Ship.

688.—(1.) Whenever any injury has in any part of the world been caused to any property belonging to Her Majesty or to any

of Her Majesty's subjects by any foreign ship, and at any time thereafter that ship is found in any port or river of the United Kingdom or within three miles of the coast thereof, a judge of any court of record in the United Kingdom (and in Scotland the Court of Session and also the Sheriff of the county within whose jurisdiction the ship may be) may, upon its being shown to him by any person applying summarily that the injury was probably caused by the misconduct or want of skill of the master or mariners of the ship, issue an order directed to any officer of customs or other officer named by the judge, court, or Sheriff, requiring him to detain the ship until such time as the owner, master, or consignee thereof has made satisfaction in respect of the injury, or has given security, to be approved by the judge, court, or Sheriff, to abide the event of any action, suit, or other legal proceeding that may be instituted in respect of the injury, and to pay all costs and damages that may be awarded thereon; and any officer of customs or other officer to whom the order is directed shall detain the ship accordingly.

(2.) Where it appears that, before an application can be made under this section, the ship in respect of which the application is to be made will have departed from the limits of the United Kingdom or three miles from the coast thereof, the ship may be detained for such time as will allow the application to be made and the result thereof communicated to the officer detaining the ship, and that officer shall not be liable for any costs or damages in respect of the detention unless the same is proved to have been made without reasonable grounds.

(3.) In any legal proceeding in relation to any such injury aforesaid, the person giving security shall be made defendant or defender, and shall be stated to be the owner of the ship that has occasioned the damage; and the production of the order of the judge, court, or Sheriff made in relation to the security shall be conclusive evidence of the liability of the defendant or defender to the proceeding.

Detention of Ship and Distress on Ship.

692.—(1.) Where under this Act a ship is to be or may be detained, any commissioned officer on full pay in the naval or military service of Her Majesty, or any officer of the Board of Trade, or any officer of Customs, or any British consular officer may detain the ship, and if the ship after detention or after service on the master of any notice of or order for detention proceeds to sea before it is released by competent authority, the master of the ship, and also the owner, and any person who sends the ship to sea, if that owner or person is party or privy to the offence, shall be liable for each offence to a fine not exceeding one hundred pounds.

(2.) Where a ship so proceeding to sea takes to sea when on board thereof in the execution of his duty any officer authorised to detain the ship, or any surveyor or officer of the Board of Trade, or any officer of Customs, the owner and master of the ship shall each be liable to pay all expenses of and incidental to the officer or surveyor being so taken to sea, and also to a fine not exceeding one hundred pounds, or, if the offence is not prosecuted in a

summary manner, not exceeding ten pounds for every day until the officer or surveyor returns, or until such time as would enable him after leaving the ship to return to the port from which he is taken, and the expenses ordered to be paid may be recovered in like manner as the fine.

(3.) Where under this Act a ship is to be detained an officer of Customs shall, and where under this Act a ship may be detained an officer of Customs may, refuse to clear that ship outwards or to grant a transire to that ship.

(4.) Where any provision of this Act provides that a ship may be detained until any document is produced to the proper officer of customs, the proper officer shall mean, unless the context otherwise requires, the officer able to grant a clearance or transire to such ship.

693. Where any court, justice of the peace, or other magistrate has power to make an order directing payment to be made of any seaman's wages, fines, or other sums of money, then, if the party so directed to pay the same is the master or owner of a ship, and the same is not paid at the time and in manner prescribed in the order, the court, justice of the peace, or magistrate who made the order may, in addition to any other powers they may have for the purpose of compelling payment, direct the amount remaining unpaid to be levied by distress or poinding and sale of the ship, her tackle, furniture, and apparel.

Evidence, Service of Documents, and Declarations.

694. Where any document is required by this Act to be executed in the presence of or to be attested by any witness or witnesses, that document may be proved by the evidence of any person who is able to bear witness to the requisite facts without calling the attesting witness or the attesting witnesses or any of them.

695.—(1.) Where a document is by this Act declared to be admissible in evidence, such document shall, on its production from the proper custody, be admissible in evidence in any court or before any person having by law or consent of parties authority to receive evidence, and, subject to all just exceptions, shall be evidence of the matters stated therein in pursuance of this Act or by any officer in pursuance of his duties as such officer.

(2.) A copy of any such document or extract therefrom shall also be so admissible in evidence if proved to be an examined copy or extract, or if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original document was entrusted, and that officer shall furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words, but a person shall be entitled to have—

(a) A certified copy of the particulars entered by the registrar in the register book on the registry of the ship, together

with a certified statement showing the ownership of the ship at the time being; and

- (b) A certified copy of any declaration, or document, a copy of which is made evidence by this Act,

on payment of one shilling for each copy. . . .

696.—(1.) Where for the purposes of this Act any document is to be served on any person, that document may be served—

- (a) in any case by delivering a copy thereof personally to the person to be served, or by leaving the same at his last place of abode; and,
- (b) if the document is to be served on the master of a ship, where there is one, or on a person belonging to a ship, by leaving the same for him on board that ship with the person being or appearing to be in command or charge of the ship; and,
- (c) if the document is to be served on the master of a ship, where there is no master, and the ship is in the United Kingdom, on the managing owner of the ship, or, if there is no managing owner, on some agent of the owner residing in the United Kingdom, or where no such agent is known or can be found, by affixing a copy thereof to the mast of the ship. . . .

697. Any exception, exemption, proviso, excuse, or qualification, in relation to any offence under this Act, whether it does or does not accompany in the same section the description of the offence, may be proved by the defendant, but need not be specified or negatived in any information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant.

Procedure in Scotland.

703.* In Scotland, all prosecutions, complaints, actions, or proceedings under this Act, other than prosecutions for felonies . . . may be brought in a summary form before the Sheriff of the county, or before any two justices of the peace of the county or burgh where the cause of such prosecution or action arises, or where the offender or defender may be for the time, and when of a criminal nature or for fines or penalties, at the instance of the procurator-fiscal of court, or at the instance of any party aggrieved, with concurrence of the procurator-fiscal of court; and the court may, if it think fit, order payment by the offender or defender of the costs of the prosecution or action.

704. Where in any summary proceedings under this Act in Scotland any complaint or action is brought in whole or in part for the enforcement of a pecuniary debt or demand, the complaint may contain a prayer for warrant to arrest upon the dependence.

* As amended by Merchant Shipping Act, 1906, sec. 82 (4).

705. On any summary proceedings in Scotland the deliverance of the sheriff-clerk or clerk of the peace shall contain warrant to arrest upon the dependence in common form, where that warrant has been prayed for in the complaint or other proceeding: Provided always, that where the apprehension of any party, with or without a warrant, is authorised by this Act, such party may be detained in custody until he can be brought at the earliest opportunity before any two justices or the Sheriff who may have jurisdiction in the place, to be dealt with as this Act directs, and no citation or induciæ shall in such case be necessary.

706. When it becomes necessary to execute such arrestment on the dependence against goods or effects of the defender within Scotland, but not locally situated within the jurisdiction of the Sheriff or justices of the peace by whom the warrant to arrest has been granted, it shall be competent to carry the warrant into execution on its being endorsed by the sheriff-clerk, or clerk of the peace of the county or burgh respectively within which such warrant comes to be executed.

707. Where on any summary proceedings in Scotland there is a decree for payment of any sum of money against a defender, the decree shall contain warrant for arrestment, poinding, and imprisonment in default of payment.

708. In all summary complaints and proceedings for recovery of any penalty or sum of money in Scotland, if a defender who has been duly cited shall not appear at the time and place required by the citation, he shall be held as confessed, and sentence or decree shall be pronounced against him in terms of the complaint, with such costs and expenses as to the court shall seem fit: Provided that he shall be entitled to obtain himself reponed against any such decree at any time before the same be fully implemented, by lodging with the clerk of court a reponing note, and consigning in his hands the sum decerned for, and the costs which had been awarded by the court, and on the same day delivering or transmitting through the post to the pursuer or his agent a copy of such reponing note; and a certificate by the clerk of court of such note having been lodged shall operate as a sist of diligence till the cause shall have been reheard and finally disposed of, which shall be on the next sitting of the court, or on any day to which the court shall then adjourn it.

709. No order, decree, or sentence pronounced by any Sheriff or justice of the peace in Scotland under the authority of this Act shall be quashed or vacated for any misnomer, informality, or defect of form; and all orders, decrees, and sentences so pronounced shall be final and conclusive, and not subject to suspension, reduction, or to any form of review or stay of execution, except on the ground of corruption or malice on the part of the Sheriff or justices, in which case the suspension or reduction must be brought within fourteen days of the date of the order, decree, or sentence complained of: Provided that no stay of execution shall be competent to the effect of preventing immediate execution of such order, decree, or sentence.

710. Nothing in this Act shall be held in any way to annul or restrict the common law of Scotland with regard to the prosecution or punishment of offences at the instance or by the direction of the Lord Advocate, or the rights of owners or creditors in regard to enforcing a judicial sale of any ship and tackle, or to give to the High Court in England any jurisdiction in respect of salvage in Scotland which it has not heretofore had or exercised.

Application of Part XIII.

712. This part of this Act shall, except where otherwise provided, apply to the whole of Her Majesty's dominions.

PART XIV.—SUPPLEMENTAL.

General Control of Board of Trade.

713. The Board of Trade shall be the department to undertake the general superintendence of all matters relating to merchant shipping and seamen, and are authorised to carry into execution the provisions of this Act and of all Acts relating to merchant shipping and seamen for the time being in force, except where otherwise provided by those Acts, or except so far as those Acts relate to the revenue.

717. The Board of Trade may take any legal proceedings under this Act in the name of any of their officers.

Definitions and Provisions as to Application of Act.

742. In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them, that is to say—

- “ Vessel ” includes any ship or boat, or any other description of vessel used in navigation.
- “ Ship ” includes every description of vessel used in navigation not propelled by oars.
- “ Foreign-going ship ” includes every ship employed in trading or going between some place or places in the United Kingdom, and some place or places situate beyond the following limits; that is to say, the coasts of the United Kingdom, the Channel Islands, and Isle of Man, and the continent of Europe between the River Elbe and Brest, inclusive.
- “ Home-trade ship ” includes every ship employed in trading or going within the following limits; that is to say, the United Kingdom, the Channel Islands, and Isle of Man, and the continent of Europe between the River Elbe and Brest, inclusive.
- “ Home-trade passenger ship ” means every home-trade ship employed in carrying passengers.

- "Master" includes every person (except a pilot) having command or charge of any ship.
- "Seaman" includes every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship.
- "Wages" includes emoluments.
- "Effects" includes clothes and documents.
- "Salvor" means, in the case of salvage services rendered by the officers or crew or part of the crew of any ship belonging to Her Majesty, the person in command of that ship.
- "Pilot" means any person not belonging to a ship who has the conduct thereof.
- "Court," in relation to any proceeding, includes any magistrate or justice having jurisdiction in the matter to which the proceeding relates.
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- "Bankruptcy" includes insolvency.
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- "Port" includes place.
- "Harbour" includes harbours properly so called, whether natural or artificial, estuaries, navigable rivers, piers, jetties, and other works in or at which ships can obtain shelter, or ship and unship goods or passengers.
- "Tidal water" means any part of the sea and any part of a river within the ebb and flow of the tide at ordinary spring tides, and not being a harbour.
- "Harbour authority" includes all persons or bodies of persons, corporate or unincorporate, being proprietors of, or intrusted with, the duty or invested with the power of constructing, improving, managing, regulating, maintaining, or lighting a harbour.

WORKMEN'S COMPENSATION ACT, 1906.

6 *Edw. VII. c. 58.*

7.*—(1.) This Act shall apply to masters, seamen, and apprentices to the sea service and apprentices in the sea-fishing service, provided that such persons are workmen within the meaning of this Act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides or has his principal place of business in the United Kingdom, subject to the following modifications:—

- (a) The notice of accident and the claim for compensation may, except where the person injured is the master, be served

* As amended by Workmen's Compensation Act, 1923 (13. & 14 Geo. V. c. 42), sec. 8.

on the master of the ship as if he were the employer, but where the accident happened and the incapacity commenced on board the ship it shall not be necessary to give any notice of the accident.

- (b) In the case of the death of the master, seaman, or apprentice, the claim for compensation shall be made within six months after news of the death has been received by the claimant.
- (c) Where an injured master, seaman, or apprentice is discharged or left behind in a British possession or in a foreign country, depositions respecting the circumstances and nature of the injury may be taken by any judge or magistrate in the British possession, and by any British consular officer in the foreign country, and if so taken shall be transmitted by the person by whom they are taken to the Board of Trade, and such depositions or certified copies thereof shall in any proceedings for enforcing the claim be admissible in evidence as provided by sections six hundred and ninety-one and six hundred and ninety-five of the Merchant Shipping Act, 1894, and those sections shall apply accordingly.
- (d) In the case of the death of a master, seaman, or apprentice, leaving no dependants, no compensation shall be payable if the owner of the ship is under the Merchant Shipping Act, 1894, liable to pay the expenses of burial.
- (e) The weekly payment shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice.
- (f) Any sum payable by way of compensation by the owner of a ship under this Act shall be paid in full, notwithstanding anything in section five hundred and three of the Merchant Shipping Act, 1894 (which relates to the limitation of a shipowner's liability in certain cases of loss of life, injury, or damage), but the limitation on the owner's liability imposed by that section shall apply to the amount recoverable by way of indemnity under the section of this Act relating to remedies both against employer and stranger as if the indemnity were damages for loss of life or personal injury.
- (g) Sub-sections (2) and (3) of section one hundred and seventy-four of the Merchant Shipping Act, 1894 (which relates to the recovery of wages of seamen lost with their ship), shall apply as respects proceedings for the recovery of compensation by dependants of master, seaman, and apprentices lost with their ship as they apply with respect to proceedings for the recovery of wages due to seamen and apprentices; and proceedings for the recovery of compensation shall in such a case be maintainable if the claim is made within eighteen months of the date at which the ship is deemed to have been lost with all hands.

(2.) This Act shall not apply to such members of the crew of a fishing vessel as are remunerated wholly or mainly by shares in the profits or gross earnings of the working of such vessel, except in such cases and subject to such modifications as the Secretary of State may by order provide:

Provided that no such order shall come into force until it has been laid before each House of Parliament for a period of not less than twenty-one days during which the House has sat, and if either House before the expiration of those twenty-one days presents an address to His Majesty against the order or any part thereof, no further proceedings shall be taken thereon, but without prejudice to the making of a new order.

(3.) This section shall extend to pilots to whom Part X. of the Merchant Shipping Act, 1894, applies, as if a pilot when employed on any such ship as aforesaid were a seaman and a member of the crew.

11.*—(1.) If it is alleged that the owners of any ship are liable as such owners to pay compensation under this Act, and at any time that ship is found in any port or river of England or Ireland, or within three miles of the coast thereof, a judge of any court of record in England or Ireland may, upon its being shown to him by any person applying in accordance with the rules of the court that the owners are probably liable as such to pay such compensation, and that none of the owners reside in the United Kingdom, issue an order directed to any officer of customs or other officer named by the judge requiring him to detain the ship until such time as the owners, agent, master, or consignee thereof have paid such compensation, or have given security, to be approved by the judge, to abide the event of any proceedings that may be instituted to recover such compensation and to pay such compensation and costs as may be awarded thereon; and any officer of customs or other officer to whom the order is directed shall detain the ship accordingly.

(2.) In any legal proceeding to recover such compensation, the person giving security shall be made defendant, and the production of the order of the judge, made in relation to the security, shall be conclusive evidence of the liability of the defendant to the proceeding.

(3.) Section six hundred and ninety-two of the Merchant Shipping Act, 1894, shall apply to the detention of a ship under this Act as it applies to the detention of a ship under that Act, and, if the owner of a ship is a corporation, it shall for the purposes of this section be deemed to reside in the United Kingdom if it has an office in the United Kingdom at which service of writs can be effected.

13. In this Act, unless the context otherwise requires—

“Ship,” “vessel,” “seaman,” and “port” have the same meanings as in the Merchant Shipping Act, 1894;

* By the Workmen's Compensation Act, 1923 (13 & 14 Geo. V. c. 42), sec. 20 this section is extended to Scotland.

348 WORKMEN'S COMPENSATION ACT, 1906.

“Manager,” in relation to a ship, means the ship’s husband or other person to whom the management of the ship is entrusted by or on behalf of the owner.

SHERIFF COURTS (SCOTLAND) ACT, 1907.

6 *Edw. VII. c. 51.*

4. The jurisdiction of the Sheriffs, within their respective sheriffdoms, shall extend to and include all navigable rivers, ports, harbours, creeks, shores, and anchoring grounds in or adjoining such sheriffdoms. And the powers and jurisdictions formerly competent to the High Court of Admiralty in Scotland in all maritime causes and proceedings, civil and criminal, including such as may apply to persons furth of Scotland, shall be competent to the Sheriffs, provided the defender shall upon any legal ground of jurisdiction be amenable to the jurisdiction of the Sheriff before whom such cause or proceeding may be raised, and provided also that it shall not be competent to the Sheriff to try any crime committed on the seas which it would not be competent for him to try if the crime had been committed on land: Provided always that where sheriffdoms are separated by a river, firth, or estuary, the Sheriffs on either side shall have concurrent jurisdictions over the intervening space occupied by water.

6. Any action competent in the sheriff court may be brought within the jurisdiction of the Sheriff—

- (c) Where the defender is a person not otherwise subject to the jurisdiction of the courts of Scotland, and a ship or vessel of which he is owner or part owner or master, or goods, debts, money, or other moveable property belonging to him, have been arrested within the jurisdiction.
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MARITIME CONVENTIONS ACT, 1911.

1 & 2 *Geo. V. c. 57.*

Provisions as to Collisions, &c.

1.—(1) Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault:

Provided that—

- (a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

- (b) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed; and
- (c) nothing in this section shall affect the liability of any person under a contract of carriage or any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law, or as affecting the right of any person to limit his liability in the manner provided by law.

(2) For the purposes of this Act, the expression "freight" includes passage money and hire, and references to damage or loss caused by the fault of a vessel shall be construed as including references to any salvage or other expenses, consequent upon that fault, recoverable at law by way of damages.

2. Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and of any other vessel or vessels, the liability of the owners of the vessels shall be joint and several:

Provided that nothing in this section shall be construed as depriving any person of any right of defence on which, independently of this section, he might have relied in an action brought against him by the person injured, or any person or persons entitled to sue in respect of such loss of life, or shall affect the right of any person to limit his liability in cases to which this section relates in the manner provided by law.

3.—(1) Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and any other vessel or vessels, and a proportion of the damages is recovered against the owners of one of the vessels which exceeds the proportion in which she was in fault, they may recover by way of contribution the amount of the excess from the owners of the other vessel or vessels to the extent to which those vessels were respectively in fault:

Provided that no amount shall be so recovered which could not, by reason of any statutory or contractual limitation of, or exemption from, liability, or which could not for any other reason, have been recovered in the first instance as damages by the persons entitled to sue therefor.

(2) In addition to any other remedy provided by law, the persons entitled to any such contribution as aforesaid shall, for the purpose of recovering the same, have, subject to the provisions of this Act, the same rights and powers as the persons entitled to sue for damages in the first instance.

4.—(1) Sub-section (4) of section four hundred and nineteen of the Merchant Shipping Act, 1894 (which provides that a ship shall be deemed in fault in a case of collision where any of the collision regulations have been infringed by that ship), is hereby repealed.

(2) The failure of the master or person in charge of a vessel

to comply with the provisions of section four hundred and twenty-two of the Merchant Shipping Act, 1894 (which imposes a duty upon masters and persons in charge of vessels after a collision to stand by and assist the other vessel) shall not raise any presumption of law that the collision was caused by his wrongful act, neglect, or default, and accordingly sub-section (2) of that section shall be repealed.

5. Any enactment which confers on on any court Admiralty jurisdiction in respect of damage shall have effect as though references to such damage included references to damages for loss of life or personal injury, and accordingly proceedings in respect of such damages may be brought *in rem* or *in personam*.

Provisions as to Salvage.

6.—(1) The master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, her crew and passengers (if any), render assistance to every person, even if such person be a subject of a foreign State at war with His Majesty, who is found at sea in danger of being lost, and, if he fails to do so, he shall be guilty of a misdemeanour.

(2) Compliance by the master or person in charge of a vessel with the provisions of this section shall not affect his right or the right of any other person to salvage.

7. Where any dispute arises as to the apportionment of any amount of salvage among the owners, master, pilot, crew, and other persons in the service of any foreign vessel, the amount shall be apportioned by the court or person making the apportionment in accordance with the law of the country to which the vessel belongs.

General Provisions.

8. No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel, whether such vessel be wholly or partly in fault, or in respect of any salvage services, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered, and an action shall not be maintainable under this Act to enforce any contribution in respect of an overpaid proportion of any damages for loss of life or personal injuries unless proceedings therein are commenced within one year from the date of payment:

Provided that any court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of court, extend any such period, to such extent and on such conditions as it thinks fit, and shall, if satisfied that there has not during such period been any reasonable opportunity of arresting the defendant vessel within the jurisdiction of the court,

or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity.

9.—(1) This Act shall extend throughout His Majesty's dominions and to any territories under his protection, and to Cyprus:

Provided that it shall not extend to the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.

(2) This Act shall not apply in any case in which proceedings have been taken before the passing thereof and all such cases shall be determined as though this Act had not been passed.

(3) The provisions of this Act shall be applied in all cases heard and determined in any court having jurisdiction to deal with the case and in whatever waters the damage or loss in question was caused or the salvage services in question were rendered.

(4) This Act shall apply to any persons other than the owners responsible for the fault of the vessel as though the expression "owners" included such persons, and in any case where, by virtue of any charter or demise, or for any other reason, the owners are not responsible for the navigation and management of the vessel, this Act shall be read as though for references to the owners there were substituted references to the charterers or other persons for the time being so responsible.

10. This Act may be cited as the Maritime Conventions Act, 1911, and shall be construed as one with the Merchant Shipping Acts, 1894 to 1907.

PILOTAGE ACT, 1913.

2 & 3 *Geo. V. c.* 31.

28.—(1) If a pilot is aggrieved by the suspension or revocation by the pilotage authority of his licence, or by the refusal or failure of the pilotage authority to renew his licence, or by the refusal or failure of the pilotage authority who have obtained possession of his licence to return it to him, or by the imposition upon him by the pilotage authority of a fine exceeding two pounds, he may either appeal to a judge of county courts having jurisdiction within the port for which the pilot is licensed, or to a metropolitan police magistrate or stipendiary magistrate having jurisdiction within that port.

(2) For the purpose of hearing the appeal, the judge or magistrate shall sit with an assessor of nautical and pilotage experience selected and summoned by the judge or magistrate.

(3) Objection may be taken to any person proposed to be summoned as an assessor, either personally or in respect of his qualification, and by either party to the appeal.

(4) The judge or magistrate may confirm or reverse the suspension or revocation of the licence, or make such order in the case as may seem just, and his decision shall be final, unless special leave to appeal from the same to the High Court on a question of law or a question of mixed law and fact is given by the judge or magistrate, or by the High Court, and in such case the decision of the High Court shall be final.

(5) The costs incurred by a pilotage authority under this section shall be payable out of any fund applicable to the general expenses of the pilotage authority.

(7) In Scotland the appeal under this section shall be to the sheriff having jurisdiction at the port where the decision is given, and may be heard by the sheriff sitting with an assessor as provided in this section, and rules may be made by the Court of Session by Acts of sederunt with respect to the procedure in case of those appeals in Scotland (including costs and the remuneration of assessors), subject to the concurrence of the Treasury as to fees. In the application of this section to Scotland, references to the Court of Session shall be substituted for references to the High Court.

APPENDIX II.

ACTS OF SEDERUNT.

ACT OF SEDERUNT, 11TH JULY, 1839.

Part III. cap. I., section 161.—The form of process in . . . maritime causes shall be the same as nearly as possible with that in ordinary actions before the Sheriff Court.

ACT OF SEDERUNT, 16TH FEBRUARY, 1841.

Section 17.—When it shall be made out upon oath to the satisfaction of the Court that a witness resides beyond the reach of the process of the Court and is not likely to come within its authority before the day of trial . . . or is a seafaring man, or is obliged to go into foreign parts or shall be abroad and not likely to return before the day of trial, it shall be competent to examine such witness by commission on interrogatories to be settled by the parties and approved of by one of the Principal Clerks of Session or Record Clerk; and it being established at

the trial to the satisfaction of the Court, by affidavit, or by oath in open Court that such witness . . . cannot attend owing to absence . . . it shall be competent to use at the trial the evidence so taken, subject to all legal objections to its admissibility; and in all cases where a commission is granted upon the application of one party for examining witnesses as aforesaid it shall be competent to the other party to have a joint commission or to propose cross-interrogatories to such witnesses to be settled as aforesaid; and in addition to the interrogatories so settled it shall be competent to the commissioner to put such additional questions to the witnesses as may appear to him to be necessary, taking care to mark the question so put by him as put by him; that when one party obtains a commission to examine witnesses and does not use the evidence obtained under the commission the other party may use the evidence given under it at the trial provided he satisfies the Court at the trial that he could not bring the witness or witnesses whose evidences he proposes to read, in which case he shall be liable for the expenses of the commission. The depositions taken on commission shall not be used if the witnesses so examined shall afterwards be brought forward at the trial.

CODIFYING ACT OF SEDERUNT, 1913.

BOOK A.

Chapter VIII.—Nautical Assessors.

1. *In Outer House—Motion by Party.*

In any action or proceeding in the Outer House of the Court of Session in which it is competent to summon to the assistance of the Court a nautical assessor or nautical assessors under the provisions of the Nautical Assessors Act 1894, any party to the said action or proceeding who may desire the presence of such assessor shall intimate his desire to the Lord Ordinary by motion at least *fourteen* days before the date of trial, proof, or hearing at which the presence of such an assessor is required.

2. *Interlocutor Intimated to P.C.S.*

The Lord Ordinary shall thereupon, if he see fit, pronounce an interlocutor ordering an assessor to be summoned, whereupon the Clerk of Court shall send written notice with a print of the record in the action to the principal clerk of Session, who shall keep the list of assessors approved of by the Lord President, that the presence of an assessor is desired on a particular day. The Lord Ordinary may specify in the said interlocutor the class or description of assessor on the said list whose presence is desired.

3. *Notice of Proposed Assessor's Name.*

The principal clerk shall, as soon as may be after receiving the said notice, send to the parties or their agents the name of the

assessor whom it is proposed to summon. Any party desiring to take objection to the assessor so named, either personally or in respect of his qualification, shall within *four* days of receiving such notice state his objection with the grounds for it by letter to the principal clerk who shall have power to deal with the same, or, should any of the parties so desire, shall lay it without enrolment before the Lord Ordinary to be dealt with as to his Lordship shall seem fit. If the objection shall be sustained, the like procedure shall be followed for obtaining the name of another assessor, and so on in the event of successive objections being taken and sustained, provided always that the name of the assessor who is to attend shall be finally settled at least *three* clear days before the trial, proof, or hearing, and if necessary for that purpose, the Lord Ordinary may postpone the date of the trial, proof, or hearing.

4. *Attendance of Assessor.*

If no objection to the name of the assessor proposed to be summoned is taken, or when any objection has been taken and repelled, it shall then be the duty of the principal clerk to arrange for the attendance of the assessor at the trial, proof, or hearing.

5. *Where Lord Ordinary Desires Assessor.*

In the event of the Lord Ordinary being of opinion that the case is one in which the presence of a nautical assessor is desirable, although none of the parties may have moved to that effect, he shall not later than *fourteen* days before the date of the trial, proof, or hearing intimate his opinion to the parties, and the same procedure shall thereupon be followed as is hereinbefore provided.

6. *Inner House Procedure.*

In any action or proceeding of the nature specified in the foresaid Act of Parliament, in which a trial or proof is to be taken before one of the judges of the Inner House of the Court of Session, the same procedure *mutatis mutandis* shall be followed as is hereinbefore provided with reference to actions or proceedings in the Outer House.

7. *Number of Assessors in Inner House.*

In any hearing in the Inner House, whether on reclaiming note, appeal, or otherwise, to which the foresaid Act of Parliament applies, the number of assessors to be summoned to the assistance of the Court, whether of its own motion or on the application of any party, shall be one or more than one, as the Court shall think fit, provided always that where any party desires the presence of an assessor or assessors he shall intimate his desire by enrolment in the Single Bills, and in any event the Court shall, not later than *eight* days before the hearing, give the parties an opportunity of stating any objections which they may have to the person or persons proposed to be summoned, either personally or in respect of their qualification, and shall dispose of the same if stated.

8. *Remuneration of Assessor.*

The remuneration of every person attending as a nautical assessor under the foresaid Act of Parliament, shall be three guineas a day for each day on which he so attends, and also for any Sunday over which he is necessarily detained at the seat of the Court, besides maintenance and travelling expenses. In the case of an assessor resident out of Scotland, he shall be entitled to charge a day for coming and a day for going at the above rate, but other assessors shall not be entitled to a fee for travelling days unless, owing to the distance from the seat of the Court at which they reside, it is impossible, with reasonable convenience, to travel on the day or days on which they are required to sit in Court.

9. *Consignation to Meet Expense.*

When, on the motion of a party to the cause, an assessor or assessors is or are to be summoned under the provisions of the foresaid Act of Parliament, the motion shall only be granted on condition that the party making it shall consign with the principal clerk of Session such sum to meet the fees and expenses above provided as the Court may determine; and when an assessor or assessors is or are to be summoned *ex proprio motu* of the Court, such consignation shall be made by the pursuer of the action, unless the Court shall otherwise direct.

BOOK E.

Chapter III.—Arrestments and Inhibitions.

3. *Warrants to Dismantle.*

A warrant to dismantle a ship shall not require the signature of the Lord Ordinary on the Bills; but such warrant, if signed by the Clerk of the Bills, or the Assistant-Clerk of the Bills in his absence, shall have the same force and authority as if signed by the Lord Ordinary on the Bills according to the existing practice.

BOOK L.

Chapter I.—Nautical Assessors in the Sheriff Court.

1. *Procedure and Number of Assessors.*

In any action or proceeding in the Sheriff Court to which the Nautical Assessors Act 1894 applies, the number of assessors to be summoned to the assistance of the Court at any particular stage of the cause, whether on the initiative of the Court or on the application of any party, shall be one in the case of a proof, and one or more than one in the case of a hearing on appeal, as the Court shall think fit, provided always (a) that intimation of the name or names of the person or persons proposed to be summoned shall be given to the parties by the sheriff-clerk at least *eight* days before the proof or the hearing for which the summons is to be issued; (b) that if any party intends to object to the

person or persons proposed to be summoned he shall state his objection, with the grounds of it, by minute lodged in process within *two* days after receipt of the intimation; (c) that the objections, if any, shall be disposed of by the Court at least *three* days before the proof or the hearing; (d) that if the objection is sustained, the like procedure shall be followed for securing another assessor, and the Court shall, if necessary for that purpose, adjourn the proof or the hearing; and (e) that it shall be the duty of the sheriff-clerk, if no minute is lodged as aforesaid, or when any objection has been taken and repelled, to arrange for the attendance at the proof or hearing of the person or persons named in the foresaid intimation.

2. *Remuneration of Assessor.*

The remuneration of every person attending as a nautical assessor under the aforesaid Act of Parliament shall be three guineas a day for each day on which he so attends, and also for any Sunday over which he is necessarily detained at the seat of Court, besides maintenance and travelling expenses. In the case of an assessor resident out of Scotland, he shall be entitled to charge a day for coming and a day for going at the above rate, but other assessors shall not be entitled to a fee for travelling days unless, owing to the distance from the seat of the Court at which they reside, it is impossible with reasonable convenience, to travel on the day or days on which they are required to sit in Court.

3. *Consignation to Meet Expense.*

When, on the motion of a party to the cause, an assessor or assessors is or are to be summoned under the provisions of the foresaid Act of Parliament, the motion shall only be granted on condition that the party making it shall consign with the sheriff-clerk such sum to meet the fees and expenses above provided as the Court may determine; and when an assessor or assessors is or are to be summoned *ex proprio motu* of the Court, such consignation shall be made by the pursuer of the action, unless the Court shall otherwise direct.

Chapter XI.—Appeals to the Sheriff under the Merchant Shipping Act, 1894.

1. *Procedure by Initial Writ.*

Appeals to the Sheriff under section 610 of the Merchant Shipping Act 1894 shall be by initial writ under the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII. cap. 51), Form A (m); and the proceedings thereon shall be as laid down in that statute.

2. *Time for Appeal.*

Such initial writ shall be presented to the Sheriff within twenty-one days from the date of the decision appealed from, and there shall be produced along with it two copies of the decision, one of which shall be certified to be a true copy by the clerk or secretary of the Pilotage Authority.

3. *Citation of Pilotage Authority.*

On the initial writ being presented the sheriff-clerk shall grant warrant to cite the Pilotage Authority, which citation shall be made by serving a copy of the writ and of the warrant of citation upon the clerk or secretary of the Pilotage Authority.

4. *Expenses and Fees.*

The expenses and Court fees connected with the appeal shall be the same as prescribed for civil causes in the Sheriff Courts.

5. *Nautical Assessor.*

The provisions of the Nautical Assessors (Scotland) Act 1894, and relative provisions in Book L, Chapter I. hereof, shall apply to the assessor of nautical and pilotage experience provided for by the said section of the Merchant Shipping Act.

ACT OF SEDERUNT, 25TH JUNE, 1919.

Nautical Assessors.

The Lords of Council and Session, considering that, owing to the great rise in wages and prices caused by the war, it is expedient that an increase be authorised in the fees allowed to nautical assessors by C. A. S., Book A, Chapter viii., section 8, do hereby amend said section by deleting the words "three guineas" therein and inserting the words "four guineas" in lieu thereof, and the said amendment shall take effect in all causes in which a nautical assessor shall sit after this date.

ACT OF SEDERUNT, 29TH OCTOBER, 1919.

Pilotage Appeals.

The Lords of Council and Session, considering that section 610 of the Merchant Shipping Act, 1894, has been repealed by the Pilotage Act, 1913, and section 28 of that statute has been substituted therefor: Hereby amend C. A. S., Book L, Chapter xi., by deleting the heading and first section thereof and substituting therefor: "Appeals to the Sheriff under the Pilotage Act, 1913 (2 & 3 Geo. V. cap. 31, section 28):

"1. *Procedure by Initial Writ.*—Appeals to the Sheriff under section 28 of the Pilotage Act, 1913, shall be by initial writ under the Sheriff Courts (Scotland) Acts, 1907 and 1913 (7 Edw. VII. cap. 51, and 2 & 3 Geo. V. cap. 28), and the proceedings thereon shall be as laid down in those statutes."

And enact and declare that said C. A. S., Book L, Chapter xi., amended as above shall regulate appeals under the Pilotage Act, 1913.

ACT OF SEDERUNT, 20TH DECEMBER, 1924.

Workmen's Compensation Acts.

4. *Court, where Parties Resident in Different Districts.*—Applications under the Acts, if the parties reside in different districts, shall be made to the Sheriff Court of the county or district of a county—

(3) if the accident occurred at sea—

(a) in which the ship is at the time when intimation or service of the application is made; provided that such intimation or service is made to or on the master of the ship in the same county or district of a county; or

(b) in which the managing owners of the ship, or some or one of them, or the manager, may reside or have a place of business; or

(c) in which the ship is registered,

without prejudice to any transfer as hereinafter provided.

18. *Application for detention of a Ship.*—An application for an order for the detention of a ship under Section 11 of the principal Act as amended by Section 20 of the Act of 1923, shall be subject to the following regulations:—

(1) A person intending to apply for an order for detention shall, if the name and address of the agent in Great Britain for the owner or charterers of the ship, or of a solicitor in Great Britain authorised to act for the owners, charterers, agent, master, or consignee of the ship, are known to him, give to such agent or solicitor by post, telegram or otherwise such notice of the time and place at which the application for an order for detention is intended to be made as may be practicable in the circumstances of the case.

(2) If a solicitor in Great Britain represents that he is authorised to act for the owners, charterers, agent, master or consignee of the ship, and finds caution for an amount agreed on between the parties or fixed by the Sheriff, the Sheriff shall refuse to make an order for detention.

(3) The Sheriff may before granting the application require the applicant to find caution for any damage which any person affected by the order for detention shall sustain.

(4) An order for detention shall specify the amount for which caution shall be found as a condition of releasing the ship.

(5) The Sheriff may at any time on good cause shown recall any order for detention and shall in that case deliver to the party applying for the same an order directed to the officer named in the order for detention authorising and directing him upon payment of all expenses

attending the custody of the ship to release it forthwith.

- (6) When proceedings are commenced in any Court other than that in which the order for detention was made, the sheriff-clerk of the Court in which the order was made shall on request transmit the application with all the relative documents to the sheriff-clerk of the Court in which the proceedings are commenced.
- (7) The expenses incurred by any party in relation to an application for an order of detention may in any subsequent proceedings by way of arbitration be allowed as expenses of the arbitration.

APPENDIX III.

RULES OF COURT.

RULES OF THE COURT OF SURVEY, 1876.*

Interpretation.

3. In the construction of these Rules, words importing the singular number shall include the plural, and words importing the plural number shall include the singular number.

Courts of Survey, their Districts and Officers.

4. The Courts of Survey, with the districts assigned to each, and the persons authorised to act as Judges and Registrars thereof, and which have been approved by one of Her Majesty's Principal Secretaries of State, as set forth in Appendix A, shall be the Courts of Survey, and the Districts, Judges, and Registrars of such Courts, for the purposes of the Merchant Shipping Acts, 1854 to 1876.

Publication of Rules.

5. These Rules shall be published by Her Majesty's Stationery Office through its agents, and a copy shall be kept at the office of the Registrar of every Court of Survey and at every Custom House and Mercantile Marine Office in the United Kingdom, and may be perused thereat by the master or owner of any ship which may be provisionally detained under the Merchant Shipping Act, 1876, and by any one deputed by him.

* These rules continue in force as if made under the Merchant Shipping Act, 1894. See Merchant Shipping Act, 1894, sec. 745.

Publication of the Name of Registrar and of his Office.

6. A notice shall be put up in some conspicuous place in every Custom House and Mercantile Marine Office in the United Kingdom, containing the name of the Registrar of the Court of Survey for that district, and the name of the street or place in which such Registrar's office is situated.

Notice of Appeal.

7. Where the owner or master of a ship, hereinafter called the Appellant, desires to appeal to a Court of Survey, he shall file at the office of the Registrar of the Court of Survey for the London district, or for the district in which the ship is, hereinafter called the Court, a notice in the form No. 1 in Appendix B.

Summoning of Court.

8. Immediately upon the filing of the notice of appeal, the Registrar shall communicate the fact, by telegraph and letter, to the Board of Trade, who shall thereupon inform him whether they intend to have the appeal heard by a Wreck Commissioner, and, if so, on what day.

9. If the Board of Trade inform him that they do not intend to have the appeal heard by a Wreck Commissioner, the Registrar shall forthwith ascertain which of the other Judges of the Court will hear the appeal, and on what day.

10. On ascertaining when the hearing will take place, the Registrar shall, if there is a list of Assessors for the Court, select therefrom the person who is, in his opinion, the best qualified to act as Assessor on the appeal; or if there is no such list, he will take the instructions of the Judge as to the Assessor to be appointed.

11. The Board of Trade shall appoint the other Assessor, and shall forthwith send the name and address of such Assessor to the Registrar.

12. If the ship is a foreign ship, the Registrar shall give notice to the Consular Officer for the State to which the ship belongs, residing at or nearest to the place where the ship is detained, that, at the request of the Appellant, some competent person will be selected by the Consular Officer to act as Assessor.

13. As soon as the Registrar has ascertained by whom the appeal will be heard, he shall summon the Court in the form No. 2 in Appendix B. He shall at the same time send notice thereof to the Board of Trade and to the Appellant in the form No. 3 in Appendix B.

14. If the survey has been made on the complaint of any person, hereinafter called the Complainant, the Board of Trade shall send to him notice of the time and place appointed for the hearing.

15. Previous to the hearing the Board of Trade shall forward to the Registrar, to be produced as evidence at the hearing, an official copy of the report of the surveyor.

16. The Court shall, if practicable, be summoned to hear the appeal on a day not later than fourteen days from the filing of the notice of appeal.

Parties.

17. The Board of Trade and the Appellant shall be parties to the proceedings.

18. Any other person, on entering an appearance, may, by permission of the Judge, be made a party to the proceedings.

Notice to Produce.

19. Either party may give to the other a notice in writing to produce such documents (saving all just exceptions) as relate to any matters in difference, and which are in the possession or control of such other party; and if such notice be not complied with, secondary evidence of the contents of the said documents may be given by or on behalf of the party who gave such notice.

Notice to Admit.

20. Either party may give to the other party a notice in writing to admit any documents (saving all just exceptions); and in case of neglect or refusal to admit after such notice, the party so neglecting or refusing shall be liable for all the costs of proving such documents, whatever the result may be, unless the Court is of opinion that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the officer by whom the costs are taxed, a saving of expense.

Witnesses.

21. The Wreck Commissioner shall have power to issue subpoenas as nearly as may be in the form used in the High Court of Justice, and such subpoenas shall have effect, and may be served in any part of the United Kingdom.

Affidavits.

22. Affidavits may, by permission of the Judge, be used at the hearing, when sworn to in any of the following ways; viz. :—

In the United Kingdom, before any Judge or Registrar of a Court of Survey, or before a person authorised to administer oaths in the Supreme Court of Judicature, or before a Commissioner empowered to take or receive affidavits, or before a Justice of the Peace for the county or place where it is sworn or made.

In any place in the British dominions out of the United Kingdom before any Court, Judge, or Justice of the Peace, or any person authorised to administer oaths there in any Court.

In any place out of the British dominions, before a British Minister, Consul, Vice-Consul, or Notary Public, or before a Judge or Magistrate, his signature being authenticated by the official seal of the Court to which such Judge or Magistrate is attached.

Proceedings in Court.

23. At the hearing, the Board of Trade shall first call their witnesses, and having done so shall state in writing, what order they require the Court to make.

24. The Complainant, if he has appeared, shall then call his witnesses, and having done so shall state in writing, what order he requires the Court to make.

25. The Appellant shall then call his witnesses, and having done so shall state in writing, what order he requires the Court to make.

26. After the Appellant has examined all his witnesses, the Board of Trade and the Complainant may, on cause shown to the satisfaction of the Judge, call further witnesses in reply.

27. After all the witnesses have been examined, the Court shall first hear the Appellant, then the Complainant (if any), and afterwards the Board of Trade.

28. The Judge may adjourn the Court from time to time and from place to place, as may be most convenient.

29. The Judge may deliver the decision of the Court either *viva voce* or in writing; and, if in writing, it may be sent or delivered to the respective parties, and it shall not be necessary to hold a Court merely for the purpose of giving the decision.

30. As soon as possible after the Court has come to its decision, the Judge shall issue an order for the release or detention (either finally or on condition) of the vessel in the Form No. 4 in Appendix B.

31. The Judge shall report to the Board of Trade in the Form No. 5 in Appendix B.

Costs and Damages.

32. The Court may, if the parties consent thereto in writing, decide, whether costs or costs and damages are due, and to and from whom, and may assess the amount thereof; or the parties may, by consent in writing, refer the question to the Wreck Commissioner.

33. The order for the payment of costs, or of costs and damages, shall be in the Form No. 6 in Appendix B.

Computation of Time.

34. In computing the number of days within which any act is to be done, the same shall be reckoned exclusive of the first day and inclusive of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, or Good Friday, or on a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusive of that day also.

35. The days between Thursday next before and the Wednesday next after Easter Day and Christmas Day, and the three following days, shall not be reckoned or included in the computation.

Service of Notices, &c.

36. Any notice, summons, or other document issuing out of the Court may be served by post.

37. The service of any notice, summons, or other document may be proved by the oath or affidavit of the person by whom it was served.

Table of Fees.

38. The Fees, a table whereof is in Appendix C., shall be demanded and taken in any proceedings before a Court of Survey.

Dated this 29th day of September, 1876.

CAIRNS, C.

APPENDIX A.

Lists of the Court of Survey, with the district assigned to each, and the persons authorised to act as judges and registrars thereof, approved by one of Her Majesty's principal Secretaries of State.

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Districts.

The district of a Court of Survey in Scotland . . . shall be the district of the Port of Customs of the place, at which the Court is held.

The Courts shall be held at the places, whose names they bear, or at any place within their respective districts, and may, by the permission of the Judge, be adjourned to any place out of such districts.

Judges.

The Wreck Commissioner shall be a Judge of every Court of Survey in the United Kingdom.

The persons whose official titles are set out in column No. 2 shall be the other judges of the Courts of Survey at the places opposite to which their names occur.

Registrars.

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The Registrar of a Court of Survey in Scotland shall be the Sheriff Clerk of the county, in which the Court is held, and his office shall be the office of the said Sheriff Clerk.

LIST No. 2.

COURTS OF SURVEY IN SCOTLAND.

Column No. 1.	Column No. 2.
Court of Survey for	Judges of the Courts of Survey at the places opposite to which their Names occur.
Leith - - - -	Sheriff and Sheriff Substitutes of Midlothian, Haddington, and Linlithgow.
Granton - - - -	Sheriff and Sheriff Substitutes of Midlothian, Haddington, and Linlithgow.
Borrowstoness - - -	Sheriff and Sheriff Substitutes of Linlithgow and Stirling.
Grangemouth - - -	Sheriff and Sheriff Substitutes of Linlithgow and Stirling.
Alloa - - - -	Sheriff and Sheriff Substitutes of Stirling, Clackmannan, and Perthshire.
Kirkcaldy - - - -	Sheriff and Sheriff Substitutes of Fifeshire and Perthshire.
Dundee - - - -	Sheriff and Sheriff Substitutes of Perthshire, Forfarshire, and Kincardine.
Arbroath - - - -	Sheriff and Sheriff Substitutes of Perthshire, Forfarshire, and Kincardine.
Montrose - - - -	Sheriff and Sheriff Substitutes of Perthshire, Forfarshire, and Kincardine.
Aberdeen - - - -	Sheriff and Sheriff Substitutes of Aberdeenshire and Kincardine.
Peterhead - - - -	Sheriff and Sheriff Substitutes of Kincardine, Banffshire, and Aberdeenshire.
Banff - - - -	Sheriff and Sheriff Substitutes of Aberdeenshire, Banffshire, and Elgin.
Inverness - - - -	Sheriff and Sheriff Substitutes of Nairn, Invernessshire, and Ross.
Wick - - - -	Sheriff and Sheriff Substitutes of Caithness and Sutherland.
Campbeltown - - -	Sheriff and Sheriff Substitutes of Argyleshire.
Glasgow - - - -	Sheriff and Sheriff Substitutes of Lanarkshire, Renfrewshire, and Dumbarton.
Greenock - - - -	Sheriff and Sheriff Substitutes of Lanarkshire, Renfrewshire, and Ayrshire.
Ardrossan - - - -	Sheriff and Sheriff Substitutes of Renfrew and Ayrshire.
Ayr - - - -	Sheriff and Sheriff Substitutes of Ayrshire, Renfrewshire, and Wigtonshire.
Stranraer - - - -	Sheriff and Sheriff Substitutes of Ayrshire, Wigton, and Kircudbright.
Wigtown - - - -	Sheriff and Sheriff Substitutes of Ayrshire, Wigton, and Kircudbright.
Dumfries - - - -	Sheriff and Sheriff Substitutes of Dumfries and Kircudbright.

APPENDIX B.

The following forms shall be employed, as far as possible, with such alterations as circumstances may require, but no deviation from the prescribed forms shall invalidate the proceedings, unless the Judge shall be of opinion that the deviation was material.

No. 1. *Notice of Appeal.*

The Merchant Shipping Acts, 1854 to 1876.

In the matter of the ship "Marian."

To the Registrar of the Court of Survey for.....

Take notice that I [*name and address*] the master [*or managing owner or owner ofshares*] of the ship.....of the port of.....do appeal

(1) from the report of *L.M.*, the Surveyor appointed by the Board of Trade to survey the said ship.

or (2) from a declaration given by.....a shipwright surveyor or engineer (*or from the refusal of.....a shipwright surveyor or engineer to give a declaration*), under the provisions of section 309 of the Merchant Shipping Act, 1854.

or (3) from the refusal of.....an emigration officer (*or as the case may be*) to give a certificate of clearance under sections 11 and 50 of the Passengers Act, 1855.

or (4) from the refusal of.....appointed by the Board of Trade under the provisions of section 30 of the Merchant Shipping Act Amendment Act, 1862, to give a certificate that the said ship is properly provided with lights and with the means of making fog signals.

The address at which all notices and documents may be served by post or otherwise on me is.....

Dated this.....day of.....

(*To be signed by the appellant.*)

No. 2. *Summons to Court.*

The Merchant Shipping Acts, 1854 to 1876.

The Court of Survey for.....

In the matter of an Appeal by.....from the report of *L.M.*, the Surveyor appointed by the Board to survey the "Marian" [*or as the case may be*].

366 RULES OF THE COURT OF SURVEY, 1876.

In pursuance of the Merchant Shipping Act, 1876, I hereby summon you to attend as Judge [*or Assessor*] on this appeal, at , on the.....day of..... , at the hour of.....in the.....noon.

Dated this.....day of.....187....

.....Registrar.

I will attend as summoned.

.....*Signature of person summoned.*

No. 3. Notice of Sitting of Court of Survey.

The Merchant Shipping Acts, 1854 to 1876.

The Court of Survey for.....

In the matter of an Appeal by.....from the report of *L.M.*, the Surveyor appointed by the Board of Trade to survey the "*Marian*" [*or as the case may be*].

To *A.B.*, the master [*or managing owner, or owner of*..... shares] of the ship....., the appellant [*or the Board of Trade*].

Take notice that the Court of Survey will meet at....., on.....the.....day of.....187...., at..... o'clock in the.....noon, to hear the appeal in the above matter.

Dated this.....day of.....187....

.....Registrar.

No. 4. Order of Court for Release or Detention of Ship.

The Merchant Shipping Acts, 1854 to 1876.

The Court of Survey for.....

In the matter of an Appeal by.....from the report of *L.M.*, the Surveyor appointed by the Board of Trade to survey the "*Marian*" [*or as the case may be*].

I.....do, with the concurrence of....., order the said ship to be released *or* detained [*finally or conditionally upon*.....].

Given under my hand this.....day of.....18...

.....Judge.

We [*or I*] concur in the above report.

.....Assessor.

.....Assessor.

No. 5. Report of Judge of Court of Survey.

The Merchant Shipping Acts, 1854 to 1876.

The Court of Survey for.....

In the matter of an Appeal by.....from the report of
L.M., the Surveyor appointed by the Board of Trade to survey
 the "*Marian*" [*or as the case may be*].

I.....do report that, having heard this appeal, I did,
 with the concurrence of.....order the said ship to be
 released *or* detained [finally *or* conditionally upon.....]
 for the reasons set forth in the annexed statement.

I am also of opinion that the costs of this appeal should be
 paid by *A.B.* to the Solicitor of the Board of Trade [*or* by the
 Solicitor to the Board of Trade to *A.B.*; *or* that all parties shall
 pay their own costs.]

Dated this.....day of.....18....

.....Judge.

We [*or I*] concur in the above report.

.....Assessor.

.....Assessor.

No. 6. Order for Payment of Costs, or of Costs and Damages.

The Merchant Shipping Acts, 1854 to 1876.

The Court of Survey for.....

In the matter of an Appeal by.....from.....
 [The parties to this appeal having, by agreement in writing,
 consented to refer the question whether any costs or costs and
 damages are due, and to and from whom, to me *or* us, with liberty
 to assess the amount thereof], I order

(1) that the Board of Trade do pay to the appellant the sum of
for the costs [*or* the costs and damages] incurred
 by reason of such detention and survey.

or (2) that the appellant do pay to the Solicitor of the Board
 of Trade the sum of.....for the costs incurred by reason of
 the detention and survey of the said ship.

or (3) that each party pay his own costs.

Given under my hand this.....day of.....18...

.....Judge.

We [*or I*] concur in the above report.

.....Assessor.

.....Assessor.

Note—Appendix C is printed *infra*, p. 387.

FURTHER RULES FOR COURTS OF SURVEY, 1877.

1. The Fees set forth in Appendix C. to the General Rules established for Courts of Survey in the United Kingdom, bearing date the 29th September, 1876, shall be taken in Stamps, to be impressed, so far as may be possible, on the documents to which they refer, such impressed stamps to be obtained from the Commissioners of Inland Revenue in London, or from their stamp distributors.

2. Immediately on the termination of an Appeal before a Court of Survey elsewhere than in London, the Registrar of the Court shall forward to the Registry of the Court of Survey for London, at Somerset House, London, for deposit therein, all the papers, stamped and unstamped, belonging to the said Appeal.

Dated this 11th day of January, 1877.

(Signed) CAIRNS, C.

THE SHIPPING CASUALTIES AND APPEALS AND
RE-HEARINGS RULES, 1923.

Short Title and Commencement.

1. These Rules may be cited as the Shipping Casualties and Appeals and Re-hearings Rules, 1923. They shall come into operation on the 1st August, 1923, and shall, so far as practicable, and unless otherwise expressly provided, apply to all matters arising in any pending investigation or proceeding, and also to all investigations or proceedings instituted on or after the said day.

Interpretation.

2. In these Rules, unless the context or subject matter otherwise requires—

“ Investigation ” means a formal investigation into a shipping casualty :

“ Judge ” means the Wreck Commissioner, sheriff, sheriff-substitute, stipendiary magistrate, justices, or other authority empowered to hold an investigation :

“ List of assessors ” means the existing list and classification of assessors for shipping casualties approved by the Secretary of State set out in Part II. of the Appendix to these Rules, or the list and classification of assessors for the time being approved by the Secretary of State :

“ Court of Appeal ” means the court by which appeals from decisions given in investigations or inquiries are for the time being heard, under the Merchant Shipping Acts, 1894 to 1921, or any Act amending the same.

Notice of Investigation.

3. When an investigation has been ordered, the Board of Trade may cause a notice, to be called a notice of investigation, to be served upon the owner, master, and officers of the ship, as well as upon any person who in their opinion ought to be served with such notice. The notice shall contain a statement of the questions which, on the information then in possession of the Board of Trade, they intend to raise on the hearing of the investigation, and shall be in the form No. 1 in Part I. of the Appendix, with such variations as circumstances may require. The Board of Trade may, at any time before the hearing of the investigation, by a subsequent notice amend, add to, or omit any of the questions specified in the notice of investigation.

4. The Board of Trade, the owner, the master, and any certificated officer or other person upon whom a notice of investigation has been served, shall be deemed to be parties to the proceedings.

5. Any other person may, by leave of the judge, appear, and any person who appears under this Rule shall thereupon become a party to the proceedings.

Notice to Produce.

6. A party may give to any other party notice in writing to produce any documents (saving all just exceptions) relating to the matters in question, and which are in the possession or under the control of such other party; and, if the notice is not complied with secondary evidence of the contents of the documents may be given by the party who gave the notice.

Notice to Admit.

7. A party may give to any other party notice in writing to admit any documents (saving all just exceptions), and in case of neglect or refusal to admit after such notice, the party so neglecting or refusing shall be liable for all the costs of proving the documents, whatever may be the result, unless the Judge is of opinion that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice has been given, except where the omission to give notice has, in the opinion of the officer by whom the costs are taxed, caused a saving of expense.

Evidence.

8. Affidavits and statutory declarations may, by permission of the Judge, and saving all just exceptions, be used as evidence at the hearing.

Proceedings in Court.

9. At the time and place appointed for holding the investigation the Court may proceed with the investigation, whether the parties, upon whom a notice of investigation has been served, or any of them, are present or not.

10. The proceedings on the investigation shall commence with the production and examination of witnesses by the Board of Trade. These witnesses, after being examined on behalf of the Board of Trade, may be cross-examined by the parties in such order as the Judge may direct, and may then be re-examined by the Board of Trade. Questions asked, and documents tendered as evidence in the course of the examination of these witnesses, shall not be open to objection merely on the ground that they do or may raise questions which are not contained in, or which vary from, the statement of the case, or questions specified in the notice of investigation or subsequent notices referred to in Rule 3.

11. When the examination of the witnesses produced by the Board of Trade has been concluded, the Board of Trade shall state in open Court the questions in reference to the casualty, and the conduct of the certificated officers, or other persons connected therewith, upon which the opinion of the Court is desired. In framing the questions for the opinion of the Court the Board of Trade may make such modifications in, additions to, or omissions from the questions in the notice of investigation or subsequent notices referred to in Rule 3, as having regard to the evidence which has been given, the Board of Trade may think fit.

12. After the questions for the opinion of the Court have been stated, the Court shall proceed to hear the parties to the investigation upon, and determine the questions so stated. Each party to the investigation shall be entitled to address the Court and produce witnesses, or recall any of the witnesses who have already been examined for further examination, and generally adduce evidence. The parties shall be heard and their witnesses examined, cross-examined, and re-examined in such order as the Judge shall direct. The Board of Trade may also produce and examine further witnesses, who may be cross-examined by the parties, and re-examined by the Board of Trade.

13. When the whole of the evidence in relation to the questions for the opinion of the Court has been concluded, any of the parties who desire so to do may address the Court upon the evidence, and the Board of Trade may address the Court in reply upon the whole case.

14. The Judge may adjourn the investigation from time to time and from place to place, and where an adjournment is asked for by a party to the investigation or by the Board of Trade, the Judge may impose such terms as to payment of costs or otherwise as he may think just as a condition of granting the adjournment.

15. Except when the certificate of an officer is cancelled or suspended, in which case the decision shall always be given in open Court, the Judge may deliver the decision of the Court either *vivâ voce* or in writing, and if in writing it may be sent or delivered to the parties. In the latter case it shall not be necessary to hold a Court merely for the purpose of delivering the decision of the Court.

16. The Judge may order the costs and expenses of the investigation, or any part thereof, to be paid by the Board of Trade or by any other party. An order for payment of costs shall be in the Form No. 2 in Part I. of the Appendix, with such variations as circumstances may require.

17. At the conclusion of the investigation the Judge shall report to the Board of Trade. The report shall be in the form No. 3 in Part I. of the Appendix, with such modifications as circumstances may require.

Copy of Report.

18. The Board of Trade shall, on application by any party to the proceedings give him a copy of the report made to the Board.

Appeals.

20. Every such appeal shall be conducted in accordance with the conditions and regulations following (namely):—

- (a) The appellant shall, within the time hereinafter mentioned, serve on such of the other parties to the proceedings as he may consider to be directly affected by the appeal, notice of his intention to appeal, and shall also, within two days after setting down the appeal give to the said parties notice of the general grounds of the appeal.
- (b) Notice of appeal shall be served within twenty-eight days from the date on which the decision is pronounced or, within twenty-one days from the date on which the report is issued in print in London by the Board of Trade; or if the report is not issued in print, as aforesaid, then within 21 days from the date of the London Gazette in which a notice is published of the receipt by the Board of Trade of the report of the Court.
- (c) If the appeal is brought by any party other than the Board of Trade, the appellant shall before the appeal is heard give such security, if any, by deposit of money or otherwise, for the costs to be occasioned by the appeal, as the Judge from whose decision the appeal is brought on application made to him for that purpose may direct; or in the case of an appeal from the decision of a Court outside the United Kingdom as may be directed by the Court of Appeal.
- (d) The appellant shall, before the expiration of the time within which notice of appeal may be given, leave with the officer for the time being appointed for that purpose by the Court of Appeal, a copy of the notice of appeal, and the officer shall thereupon set down the appeal by entering it in the proper list.

- (e) The Court of Appeal shall be assisted by not less than two assessors to be selected, in the discretion of that Court, having regard to the nature of each case, from either or both of the following classes:—
1. Elder Brethren of the Trinity House.
 2. Persons approved from time to time by the Secretary of State as assessors for the purpose of formal investigations into shipping casualties, under sections 466 and 467 of the Merchant Shipping Act, 1894.*
- (f) The Court of Appeal may, if it thinks fit, order any other person, other than the parties served with the notice of appeal, to be added as a party or parties to the proceedings for the purposes of the appeal, on such terms with respect to costs and otherwise as the Court of Appeal may think fit. Any party to the proceedings may object to the appearance on the appeal of any other party to the proceedings as unnecessary.
- (g) The evidence taken before the Judge from whose decision the appeal is brought shall be proved before the Court of Appeal by a copy of the notes of the Judge, or of the shorthand writer, clerk, secretary, or other person authorised by him to take down the evidence, or by such other materials as the Court of Appeal thinks expedient; and a copy of the evidence, and of the report to the Board of Trade containing the decision from which the appeal is brought, and of the notice of the general grounds of the appeal, shall be left with the officer for the time being appointed for that purpose by the Court of Appeal before the appeal comes on for hearing. For the purpose of this Rule, copies of the notes of the evidence, and of the report, shall be supplied to the appellant, on request, by the Judge or other person having charge thereof, on payment of the usual charge for copying.
- (h) The Court of Appeal shall have full power to receive further evidence on questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Evidence may also be given with special leave of the Court of Appeal as to matters which have occurred since the date of the decision from which the appeal is brought.
- (i) The Court of Appeal shall have power to make such order as to the whole or any part of the costs of and occasioned by the appeal as the Court may think just.
- (j) Subject to the foregoing provisions of this Rule, every appeal shall be conducted under and in accordance with the general rules and regulations applicable to ordinary proceedings before the Court of Appeal, but there shall not be anything in the nature of pleadings other than the notice of the general grounds of the

appeal, except by special permission of the Court of Appeal.

- (k) On the conclusion of an appeal the Court of Appeal shall send to the Board of Trade a report of the case in such form as the Court of Appeal may think fit.

Re-hearings by Order of Board of Trade.

21.—(a) Where the Board of Trade direct a re-hearing, under section 475 or 478 of the Merchant Shipping Act, 1894, they shall cause such reasonable notice to be given to the parties whom they consider to be affected by the re-hearing as the circumstances of the case may, in the opinion of the Board of Trade, permit.

(b) The provisions distinguished as (e), (f), (g), (h), (i), (j), and (k), of the last foregoing rule shall apply to a re-hearing as if it were an appeal, and as if the Court or authority before whom the re-hearing takes place were the Court of Appeal.

Appointment of Assessors.

22. Subject to these Rules assessors for investigations into shipping casualties shall be appointed from the list of assessors by the Secretary of State.

23. If any investigation involves or appears likely to involve the cancelling or suspension of the certificate of a master, mate, or engineer, there shall be appointed from the list of assessors not less than two assessors from Class I. and Class II. or from either of those classes.

24. Subject to any special appointment or appointments which the Secretary of State may think it expedient to make in any case where special circumstances appear to him to require a departure from these rules (the requirements of the last preceding Rule being always complied with) assessors shall be appointed as follows:—

- (1) Where the investigation involves or appears likely to involve the cancelling or suspension of the certificate of a master or mate, but not of an engineer, at least two assessors shall be appointed from Class I.
- (2) Where the investigation involves or appears likely to involve the cancelling or suspension of the certificate of a master or mate of a sailing ship, one at least of the assessors shall be appointed from sub-section (a) of Class I., and where the investigation involves or appears likely to involve the cancelling or suspension of the certificate of a master or mate of a steamship, one at least of the assessors shall be appointed from sub-section (b) of Class I.
- (3) Where the investigation involves or appears likely to involve the cancelling or suspension of the certificate of an engineer, one at least of the assessors shall be appointed from Class II.

25. The Board of Trade shall inform the Secretary of State when assessors are required, and shall state from which of the aforesaid classes assessors ought in their opinion to be appointed, but the Board of Trade shall not request the appointment of any individual assessor.

26. An appointment made by the Secretary of State of any assessor or assessors for an investigation shall not be open to question on the ground that it was not in accordance with these Rules, or does not give full effect to the requirements of these Rules.

Computation of Time.

27. In computing the number of days within which any act is to be done they shall be reckoned exclusive of the first and inclusive of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, or Good Friday, or on a day appointed for a public fast or thanksgiving or holiday, in which case the time shall be reckoned exclusive of that day also.

Service of Notices.

28. Any notice, summons or other document issued under these Rules may be served by sending the same by registered letter to the address of the person to be served.

29. The service of any notice, summons, or other document may be proved by the oath or affidavit of the person by whom it was served.

Repealing Clause.

30. The undermentioned Rules are hereby annulled, but nothing in these Rules shall affect the previous operation of, or anything done or suffered under, any of the said Rules—

The Shipping Casualties and Appeals and Re-hearings Rules, 1907.*

Publication of Rules.

31. A copy of these Rules shall be kept at every Custom House and Mercantile Marine Office in the United Kingdom, and any person desiring to peruse them shall be entitled to do so.

Dated the 4th day of May, 1923.

Cave, C.

* S.R. & O., 1907, No. 975.

APPENDIX.

PART I.

FORMS.

The following forms shall be used, as far as possible, with such alterations as circumstances may require, but no deviation from the prescribed forms shall invalidate the proceedings, unless the Judge shall be of opinion that the deviation was material:—

No. 1.—Notice of Investigation.

To.....master, mate, engineer, owner,
&c., of.....or.....belonging to the ship.....
of

I hereby give you notice that the Board of Trade have ordered a formal investigation into the circumstances attending the

and that subjoined hereto is a copy of a report [*or statement of the case*] upon which the said investigation has been ordered. I further give you notice to produce to the Court [*your Board of Trade certificate, the log books of the vessel, and*] any [*other*] documents relevant to this case which may be in your possession.

I have further to give you notice that on the information at present obtained by the Board of Trade the questions annexed hereto are those upon which it appears desirable, and upon which they propose, to take the opinion of the Court; but these questions will be subject to alteration, addition, omission, or amendment by the representative of the Board of Trade at the investigation, after the witnesses called by the Board of Trade have been examined.

Dated this.....day of.....19.....

Solicitor, Board of Trade.

I. *Report* [*or statement of case*].

II. *Questions.*

1. Whether the

[*Here insert the proposed questions.*]

No. 2.—Order on a Party for Payment of Costs of Investigation.

In the matter of a formal investigation held at.....
on the (*here state all the days on which the Court sat*) days of
.....before.....assisted by.....
into the circumstances attending the.....

The Court orders—

(1.) That *A.B.*, of....., do pay to the Solicitor
to the Board of Trade [the sum of.....pounds on account
of] the expenses of this investigation.

Or (2.) That the Board of Trade do pay to *A.B.*, of.....
.....[the sum of.....pounds on account
of] the expenses of this investigation.

Given under my hand this.....day of.....19....

Judge.

No. 3.—Report of Court.

In the matter of a formal investigation held at.....
on the (*here state all the days on which the Court sat*) days of
.....before.....assisted by.....
into the circumstances attending the.....

The Court, having carefully inquired into the circumstances
attending the above-mentioned shipping casualty, finds for the
reasons stated in the Annex hereto, that the (*here state finding of
the Court*).

Dated this.....day of.....19....

Judge.

We [or I] concur in the above report.

.....Assessor.

.....Assessor.

Annex to the Report.

(*here state fully the circumstances of the case, the opinion of the
Court touching the causes of the casualty; and the conduct of any
persons implicated therein, and whether the certificate of any
officer is either suspended or cancelled, and if so for what
reasons.*)

PART II.

CLASSIFICATION OF LIST OF ASSESSORS, AND QUALIFICATIONS.
PRESCRIBED FOR EACH CLASS.

The Merchant Shipping Act, 1894.

57 & 58 Vict. c. 60.

Whereas by section 466 of the Merchant Shipping Act, 1894, it is provided that—

The Court holding a formal investigation into a shipping casualty shall hold the same with the assistance of one or more assessors of nautical, engineering or other special skill or knowledge, to be appointed out of a list of persons for the time being approved for the purpose by a Secretary of State in such manner and according to such regulations as may be prescribed by Rules made under this Act with regard thereto.

And whereas by section 467 of the Merchant Shipping Act, 1894, it is enacted as follows:—

- (1) The list of persons approved as assessors for the purpose of formal investigations into shipping casualties shall be in force for three years only, but persons whose names are on any such list may be approved for any subsequent list.
- (2) The Secretary of State may at any time add or withdraw the name of any person to or from the list.
- (3) The list of assessors in force at the passing of this Act shall subject as aforesaid continue in force till the end of the year one thousand eight hundred and ninety-five.

The Secretary of State has directed that the assessors shall so far as in his opinion circumstances permit, be taken in order of rotation within each class or sub-class, and has further directed that the assessors placed by him on the list of assessors shall be classified according to their qualifications, as follows:—

Class I.—Mercantile Marine Masters.

(a) Five years' service in any certificated capacity on a British sailing ship of not less than 1,000 tons gross and two years' service as a certificated Master in command of a British sailing or steamship.

(b) Five years' service as a certificated Master in command of British Merchant vessels of which two years must have been service in command of a steamship.

Class II.—Mercantile Marine Engineers.

Five years' service as an Engineer in a Merchant vessel. A candidate for appointment must hold a first class certificate of competency as Engineer in the Mercantile Marine, and have had two years' experience as a Chief Engineer in vessels of not less than 1000 tons gross.

Class III.—Royal Navy.

(a) Rank of Admiral or Captain and three years' service in command of one of His Majesty's ships at sea.

(b) Rank of Staff Commander and three years' service in that rank of one of His Majesty's ships at sea.

(c) Rank of Commander (N.) or Lieutenant (N.) and three years' service as Navigator since passing Navigation for 1st Class ships.

Class IV.—Persons of Fishery, Naval Architectural or other SPECIAL Skill or Knowledge.

(a) Special knowledge and experience of Fishing Vessels; or

(b) Special knowledge and experience of Naval Architecture;

or

(c) Such qualification as is in the opinion of the Secretary of State requisite.

HOUSE OF LORDS ORDERS, 1923.

Admiralty Actions and Maritime Causes.

40. The parties or either party to an Appeal, may apply by letter to the Clerk of the Parliaments requesting, upon grounds stated in the letter, the attendance of Nautical Assessors on the hearing at the Bar, or the Lord Chancellor or the Lord Speaker may, in the absence of any application by the parties, direct the attendance of assessors. Such assessors shall be selected by the Lord Chancellor or the Lord Speaker from the list of Assessors furnished to the Clerk of the Parliaments by the Secretary of the Admiralty and the Secretary of the Corporation of Trinity House.

APPENDIX E.

(Orders with regard to Attendance of Nautical Assessors.)

Assessors in the House of Lords, Admiralty Actions (England), and Maritime Causes (Scotland).—The following Orders were made by the House in this matter on the 10th and 13th of May 1892 and the 13th of March 1919 in pursuance of sections 3 of the Supreme Court of Judicature Act 1891; and Orders to the like effect were made on the 20th of November 1894 and the 13th of March 1919 in pursuance of Section 6 of the Nautical Assessors (Scotland) Act 1894:

Ordered, that in each cause in which the attendance of

nautical assessors is required, this House be attended by two assessors, of whom one shall be an officer, active or retired, of Her Majesty's Navy, and the other an Elder Brother of the Corporation of Trinity House:

Ordered, that the Clerk of the Parliaments do write to the Secretary of the Admiralty for a list of assessors specially qualified to assist this House in hearing Appeals in Admiralty actions; and do also write to the Secretary of the Corporation of Trinity House for a list of the Elder Brethren of the Corporation similarly qualified.

Ordered, that a fee of £3 3s. for each day or part of a day's attendance be paid by the Clerk of the Parliaments to the assessor. The amount of such fees, failing any special order of the House on the subject, to be paid by the suitor against whom costs are awarded, or by his agent, into the Fee Fund of the House immediately after the determination of the Cause.

Ordered, that travelling expenses and a subsistence allowance of £1 ls. for each day or part of a day's attendance be paid to each assessor in addition to his attendance fee.

APPENDIX IV.

STYLES AND FORMS.

A. STYLES.

Summons in a Maritime Action in rem.

" George the Fifth, &c.—WHEREAS it is humbly meant and shown to us by our lovites.....*Pursuers*; againstand all others, the owners of the s.s..... as also against all other persons, if any, having or pretending to have right to or interest in the said s.s.....whether by way of property, bond, mortgage, debenture, security maritime lien or right of retention or otherwise in any manner of way for their respective interests, *Defenders*; THEREFORE it OUGHT and SHOULD be FOUND and DECLARED.....that the pursuers.....have a right and claim of maritime lien and real burden over the said s.s.....and further..... that in virtue of the said right and claim the pursuers have a maritime lien and real burden over the said s.s.....and further.....that the pursuers are entitled to have the said s.s.....sold under warrant of the Court and the proceeds thereof applied in payment.....and further that the said s.s.....OUGHT and SHOULD be publicly ROUPED and SOLD.....and on such sale the said s.s.....OUGHT and SHOULD be ADJUDGED to pertain and belong to the purchaser freed of all burdens and incumbrances.....OUR WILL IS HEREFOR, &c.

(Judicially approved in *Ellerman's Wilson Line Limited v. Commissioners of Northern Lighthouses*, 1921 S.C. 10.)

Petition for Warrant to Arrest a Vessel in rem.

Unto the Honourable the Lord Ordinary officiating on the Bills.

The Petition of.....
Humbly Showeth

that [state grounds on which the warrant is craved, showing that arrestment in common law form is incompetent or would fail to secure a remedy and that the claim of the petitioner is therefore liable to be defeated by reason of the vessel proceeding to sea or otherwise].

In the circumstances above explained it is necessary that a warrant be granted to the Petitioner to arrest the said vessel.

May it therefore please your Lordship to grant warrant to Messengers-at-arms to fence and arrest the said s.s..... presently lying at.....her hull, keel, engines, spars, sails, and stores with her float, boats, furniture, apparelling, and appurtenances all to remain under sure fence and arrestment at the instance of the Petitioner aye and until sufficient caution and surety be found acted in your Lordship's books that the same shall be made forthcoming to the Petitioner as accords of law and to grant authority for putting the said warrant into all lawful execution to the dismantling of the said steamship if necessary and all upon a copy of your Lordship's deliverance certified by the Clerk of Court, or to do further or otherwise in the premises as to your Lordship shall seem proper.

According to Justice, &c.

(Judicially approved in *M'Connachie, Petitioner*, 1914 S.C. 853.)

Interlocutor Granting Warrant to Arrest a Vessel in rem.

(The Lord Ordinary on the Bills).—Appoints the said petition with a copy of this deliverance to be served upon..... master of the said s.s.....and designed in the petition and allows him to appear at the bar of this Court on..... at.....o'clock and lodge answers to this petition within 8 days after service if so advised; grants warrant to messengers-at-arms to arrest the s.s.....*ad interim* and that in exhibition of a certified copy of this interlocutor and appoints the execution of arrestment to be reported to the Lord Ordinary within 24 hours.

(Judicially approved in *M'Connachie, Petitioner*, 1914 S.C. 853.)

Tender in Cross Actions of Damage by Collision.

" . . . for the pursuers (or defenders) stated that without prejudice and under reservation of the pursuers' (or defenders') rights and pleas the pursuers (or defenders) without admitting liability and for the purposes of the present action only were willing and hereby offer to settle this action on the footing that both vessels were equally to blame for the collision referred to on record."

(Judicially approved in *Owners of s.d. "Diligence" v. Owners of s.d. "Swift,"* 1921, 2 S.L.T. 145.)

B. FORMS.

Agreement and Account of Crew.*

Issued by the Board of Trade in pursuance of 57 & 58 Vict. c. 60.

THE SEVERAL PERSONS whose names are hereto subscribed, and whose descriptions are contained herein, and of whom..... are engaged as Sailors, hereby agree to serve on board the said Ship, in the several capacities expressed against their respective names on a voyage from—

And the Crew agree to conduct themselves in an orderly, faithful, honest and sober manner, and to be at all times diligent in their respective Duties, and to be obedient to the lawful commands of the said Master, or of any person who shall lawfully succeed him, and of their Superior Officers, in everything relating to the said Ship and the Stores and Cargo thereof, whether on board, in boats or on shore; in consideration of which Services to be duly performed, the said Master hereby agrees to pay to the said Crew as Wages the Sums against their Names respectively expressed, and to supply them with provisions according to the Scale on the other side hereof.

And it is hereby agreed that any Embezzlement or wilful or negligent Destruction of any part of the Ship's Cargo or Stores shall be made good to the Owner out of the Wages of the Person guilty of the same.

And it is further agreed, that if any Seaman enters himself in a capacity for which he is incompetent, he is liable to be disrated.

And it is also agreed, that the additional clauses and the Regulations authorised by the Board of Trade,† and numbered [here insert the numbers of the Regulations] are adopted by the parties hereto, and shall be considered as embodied in this Agreement; And it is also agreed, that if any Member of the Crew considers himself to be aggrieved by any breach of the Agreement or otherwise, he shall represent the same to the Master or Officer in charge of the Ship in a quiet and orderly manner, who shall thereupon take such steps as the case may require: and it is also stipulated that advances on account and allotments of part of wages shall be made as specified against the names of the respective seamen in the columns provided for that purpose.

And it is also agreed that

IN WITNESS whereof the said Parties have subscribed their Names herein, on the days mentioned against their respective signatures.

Signed by.....Master, on the..... day of.....19...

* * * * *

* See Merchant Shipping Act, 1894, secs. 113-125.

† See *infra*, p. 382.

Regulations for Maintaining Discipline.

Sanction by the Board of Trade in Pursuance of S. 114 (2) of the Merchant Shipping Act, 1894.

These Regulations are distinct from, and in addition to, those contained in the Act, and are sanctioned but not universally required by Law. All or any of them may be adopted by agreement between a Master and his Crew, and thereupon the offences specified in such of them as are so adopted will be legally punishable by the appropriate Fines or Punishments. These Regulations, however, are not to apply to Certificated Officers.

These Regulations are all numbered, and the numbers of such of them as are adopted must be inserted in the space left for that purpose in the Agreement, page 1, and the following copy of these Regulations must be made to correspond with the Agreement by erasing such of the Regulations as are not adopted. The signature or initials of the Superintendent or Consular Officer before whom the Agreement is made, must be placed opposite such of the Regulations as are adopted.

For the purpose of legally enforcing any of the following penalties, the same steps must be adopted as in the case of other Offences punishable under the Act; that is to say, a statement of the Offence must, immediately after its commission, be entered in the Official Log Book by the direction of the Master, and must at the same time be attested to be true by the signatures of the Master and the Mate, or one of the Crew; and a copy of such entry must be furnished, or the same must be read over to the Offender, before the ship reaches any Port or departs from the Port at which she is; and an entry that the same has been so furnished or read over, and of the reply, if any, of the Offender, must be made and signed in the same manner as the entry of the Offence. These entries must, upon discharge of the Offender, be shewn to the Superintendent or Consular Officer, before whom the Offender is discharged; and if he is satisfied that the Offence is proved, and that the entries have been properly made, the Fine must be deducted from the Offender's wages, and paid over to the Officer.

If, in consequence of subsequent Good Conduct, the Master thinks fit to remit or reduce any Fine upon any Member of his Crew which has been entered in the Official Log, and signifies the same to the Officer, the Fine shall be remitted or reduced accordingly, an entry being made of the fact in the Official Log. If wages are contracted for by the Voyage, or by Share, the amount of the Fines is to be ascertained in the manner in which the Amount of Forfeiture is ascertained in similar cases under Sect. 234.

No.	OFFENCE.	Amount of Fine or Punishment.	Signature of Superintendent or Consular Officer.
1	Striking or assaulting any person on Board or belonging to the Ship (if not otherwise prosecuted), - - - - -	Five Shillings.	
2	Bringing or having on Board intoxicating liquors, - - - - -	Five Shillings.	
3 {	Drunkenness. First Offence, - - - - -	Five Shillings.	
	„ Second and for each subsequent Offence, - - - - -	Ten Shillings.	
4	Taking on Board and keeping possession of any fire-arms, knuckle-duster, loaded cane, slung-shot, sword-stick, bowie-knife, dagger, or any other offensive weapon or offensive instrument, without the concurrence of the Master, for every day during which a seaman retains such weapon or instrument, - - - - -	Five Shillings.	
5	Insolent or contemptuous language or behaviour to the Master or Officers, or disobedience to lawful commands, if not otherwise dealt with according to law, -	Five Shillings.	
6	Absence without leave (if not otherwise dealt with according to law) for each day on which such absence occurs; - - - - -	Five Shillings.	

Release on Termination of Service, with Note of Excepted Claims (if any).*

Issued by the Board of Trade in pursuance of 57 & 58 Vict. cap. 60.

We, the undersigned, Members of the Crew of the above-named Ship, do hereby release the said Ship, and the Master and Owner or Owners thereof, from all claims for Wages or otherwise, in respect of the above-named Voyage, except as regards the claims or demands which are specified on the back hereof, and which are identified by the signatures of the respective Seamen notifying such excepted claims or demands. And I, the Master, do hereby release the said undersigned Members of the Crew from all claims in respect of the said voyage.

.....Master.

Dated.....the.....day of.....19

* See Merchant Shipping Act, 1894, sec. 136.

Seaman's Allotment Note.

Issued by the Board of Trade in pursuance of 57 & 58 Vict. c. 60.

The Allotment can only be in favour of the Seaman's Wife, Father, Mother, Grandfather, Grandmother, Child, Grandchild, Brother, or Sister, or in favour of a Savings Bank.

A. *Ship in which Seaman has engaged.* Name, Port of Registry and Official No. of Ship.

B. *Name, &c., of Seaman by whom Allotment is made.* Christian name of Seaman. Surname. Rank or Rating.

C. *Relation⁽¹⁾ or Bank in whose favour this Allotment Note is given.* Name and Address, or Name of Bank. Degree of Relationship.

D. *Amount and Particulars of Allotment (£ s. d.).* Date when first Payment is to be made. Intervals at which Payment is to be made.

The Seaman named in division B above, having entered into an Agreement to serve in the Ship named in division A above, and having required that a stipulation be inserted in the Agreement for the allotment of part of his wages by means of an allotment note, and such stipulation having been inserted pursuant to Section 61 of the Merchant Shipping Act, 1906, I, the undersigned, being the Master⁽²⁾ of the said Ship, give this allotment note for the amount named in division D above, in favour of the relative or bank named in division C above, to the intent that the said relative or bank shall be entitled to recover the sum so allotted in accordance with the provisions of Section 143 of the Merchant Shipping Act, 1894.

Payable by.....

.....Master.⁽²⁾

.....Seaman.

.....Witness.⁽³⁾

¹ In case of a Wife the Marriage Certificate must be produced, if required, when payment is demanded. ² If the Owner or Agent give the note, this must be altered accordingly. ³ This should be the Superintendent of a Mercantile Marine Office, a British Consul, or an Official Shipping Master in a British Possession. It should be marked with the Office Stamp to show the date and place of issue.

Provision is made for receipt signed by Seaman on back of form.

The Merchant Shipping Act, 1894, provides a summary remedy for the recovery of the Payments named in this Note.

NOTICE TO OWNERS OR AGENTS.—An Allotment of Wages under this Note may be remitted from Port to Port, free of Expense, by means of Seaman's Money Orders, to be obtained at the Mercantile Marine Offices.

Seaman's Advance Note.*

192....

£ : :

.....Days after the final Sailing from the.....
 from.....or the last Port or Place in the.....
 please pay to the order of.....the sum of
Pounds.....Shillings, provided he
 sails and continues to duly earn his Wages on Board said Vessel.

.....
Master.

NOTICE.—The above-named Seaman is to be on board the Ship at the time agreed on, or another will be shipped in his place, as per "Articles of Agreement."
 This Advance Note to be signed by the Seaman on the back; or, in the event of him not writing his name, his mark to be attested by two Witnesses, otherwise it will not be paid. Discounter's Signature and Address requires to be endorsed on this Note.

APPENDIX V.

TABLE OF FEES.

Conveyancing and General Business.†

(Adjusted and approved as a Joint Table to be used by the Society of Writers to His Majesty's Signet, the Society of Solicitors in the Supreme Courts of Scotland, the Faculty of Procurators in Glasgow, and the Incorporated Society of Law Agents in Scotland.)

V. SALES AND CONVEYANCE ON SALE.

22. Bills of Sale of Ships.

Charge.—*Ad valorem* fees, Scale 2, but not exceeding £10 10s.,
 and to include fee for settling and registering.

Professional Rule.—Same as No. 19.

If agent receives a commission for negotiating sale or purchase, no charge to be made for bill of sale.

VI. BONDS AND SECURITY DEEDS.

27. Mortgages on Ships.

Charge.—Same as No. 22.

Professional Rule.—Same as No. 26.

* No form has been issued by the Board of Trade, but the above form is in common use.

† Increased 33½ per cent. 1st January, 1920.

XIII. NOTARIAL BUSINESS.

60. Maritime Protests.

- (a) Noting simple Protests against wind and weather.

Charge.—For coasting vessels, 2s. 6d.

For other vessel, 5s.

- (b) Noting special Protests in cases of collision, and with reference to claims for Demurrage and Damages, and in other special cases requiring detail of circumstances, where no Instrument is afterwards extended.

Charge.—Where claim is under £50, - - 7s. 6d.

Where £50 or above, - - 10s. 6d.

Or to be charged by length, each sheet, 6s.

- (c) Drawing Instrument.

Charge.—Each sheet, 6s., besides fees for engrossing.

- (d) Attendance at execution of Protest and Affidavit.

Charge.—Notarial fee, 10s., besides time occupied if exceeding one hour.

Fee-Fund Dues.*

IV. BILL CHAMBER.

16. Maritime concurrences, with warrants to

dismantle, - - - - - £0 5 0

Sheriff Officers' Fees on Civil Business in Scotland.†

7. Small debt cases.

(21) Arresting vessel, - - - - - £0 10 6

8. Arresting Vessel.

1. Arresting Vessel on Ordinary Court Warrant, £1 1 0
2. Travelling, as in 7 (19) and (20).
3. Detention, for each hour or part thereof
after the first two, - - - - - 0 2 6
4. Dismantling Vessel, - - - - - 1 11 6
5. With Travelling and Detention as above,
and outlays for Skilled Artisans and Boat
Hire.

* A.S., 20th July, 1922.

† C.A.S., M. iii.; increased 50 per cent., A.S., 22nd October, 1919; increase continued to 31st October, 1925, by A.S., 18th July, 1923, and A.S., 18th July, 1924.

Fees of Nautical Assessors.

These are regulated—

- (1) In House of Lords, by H.L.O., 1923, Appendix E.¹
- (2) In Court of Session, by C.A.S., A. viii. 8, and A.S., 25th June, 1919.²
- (3) In Sheriff Court, by C.A.S., L. i. 2.³

Fees of Receivers of Wrecks.⁴

MAXIMUM FEES AND REMUNERATION OF RECEIVERS.

	£	s.	d.
For every examination on oath instituted by a receiver with respect to any vessel which may be or may have been in distress, a fee not exceeding - - -	1	0	0
But so that in no case shall a larger fee than two pounds be charged for examinations taken in respect of the same vessel and the same occurrence, whatever may be the number of the deponents.			
For every report required to be sent by the receiver to the secretary of Lloyd's in London, the sum of -	0	10	0
For wreck taken by the receiver into his custody, a percentage of five per cent. upon the value thereof.			
But so that in no case shall the whole amount of percentage so payable exceed twenty pounds.			
In cases where any services are rendered by a receiver, in respect of any vessel in distress, not being wreck, or in respect of the cargo or other articles belonging thereto, the following fees instead of a percentage; that is to say,			
If that vessel with her cargo equals or exceeds in value six hundred pounds, the sum of two pounds for the first, and the sum of one pound for every subsequent day during which the receiver is employed on that service, but if that vessel with her cargo is less in value than six hundred pounds, one moiety of the above-mentioned sum.			

Fees in the Court of Survey.⁵

	£	s.	d.
On filing notice of appeal, for every 50 tons of the gross registered tonnage of the ship, - - - -	0	10	0
On filing every affidavit, - - - -	0	2	6
On entering appearance, - - - -	0	10	0
On every subpoena, - - - -	0	2	6

¹ See *supra*, p. 378. ² See *supra*, pp. 353, 357. ³ See *supra*, p. 355.

⁴ Authorised by Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), sec. 567, and Twentieth Schedule.

⁵ Authorised by the Rules of the Court of Survey, 1876, rule 38 and Appendix C.

	£	s.	d.
On every statement of the order required to be made by the Court, - - - - -	0	10	0
On the production and swearing of every witness, - - - - -	0	2	6
On every consent by the parties to refer the question of costs, or of costs and damages, to the Court or Judge, to be paid by each party, - - - - -	0	10	0
On every hearing, for each day, to be paid by each party, the amount thereof to be at the discretion of the Judge, - - - - -	1	0	0
	5	0	0
On every order whether for the release or detention of the ship, or for payment of costs, or costs and damages, to be paid by the party taking out the order, - - - - -	1	0	0
On every office copy of the Judge's judgment or report, of the shorthand writer's notes of the evidence, or of any of the proceedings in the appeal, per folio of 72 words, - - - - -	0	0	6

[These fees are taken in stamps impressed, so far as may be possible, on the documents to which they refer, such impressed stamps being obtained from the Commissioners of Inland Revenue in London or from their stamp distributors (Further Rules of the Court of Survey, dated 11th January, 1877).]

APPENDIX VI.

STAMP DUTIES.

A. Shipping Documents Subject to Stamp Duty.

By the Stamp Act 1891¹ the following documents are subject to Stamp Duty:—

Bill of Lading of or for any goods, merchandise, or effects to be exported or carried coastwise.....6d.

Certificate of any goods, &c., duly entered inwards which shall be entered outwards for exportation at the port of importation or be removed to any other port for more convenient exportation where such certificate is issued for enabling a person to obtain a debenture or certificate entitling him to receive a drawback of any duty of customs.....4s.²

Charter Party.....6d.³

¹ 54 & 55 Vict. c. 39.

² First Schedule.

³ Secs. 49-51, First Schedule.

B. Shipping Documents Exempt from Stamp Duty.

By the Stamp Act, 1891⁴ the following documents are exempt from Stamp Duty:—

Agreement or memorandum made between the master and mariners of any ship or vessel for wages on any voyage coastwise from port to port in the United Kingdom.

Instruments for the sale, transfer, or other disposition either absolutely or by way of mortgage or otherwise of any ship or vessel or any part interest or share or property of or in any ship or vessel.

Policy of insurance against shipowners' liability under the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), sec. 503.⁵

Whether a policy of insurance against shipowners' liability under sec. 502 of that Act requires a stamp on the ground that it is a policy of sea insurance is uncertain.⁶

By the Merchant Shipping Act 1894 (*supra*) it is provided—

“Sec. 721. The following instruments shall be exempt from stamp duty:—

- “(a) any instruments used for carrying into effect the First Part of this Act; and
- “(b) any instruments used by or under the direction of the Board of Trade in carrying into effect the Second, Fifth, Eleventh, and Twelfth Parts of this Act; and
- “(c) any instruments which are by those Parts of this Act required to be in a form approved by the Board of Trade, if made in that form.”

These include,^{6a} *inter alia*—

- Bill of sale.
- Mortgage.
- Certificate of surveyor.
- Declaration of ownership by individual owner.
- Declaration of ownership on behalf of a corporation as owner.
- Certificate of registry.
- Provisional certificate.
- Declaration of ownership by individual transferee.
- Declaration of ownership on behalf of a corporation as transferee.
- Declaration of owner taking by transmission.
- Declaration by mortgagee taking by transmission.
- Certificate of mortgage.
- Certificate of sale.
- Revocation of certificate of sale or mortgage.
- Statutory agreement of service.

⁴ *Supra*, First Schedule.

⁵ Cf. sec. 93 (i); Merchant Shipping Act, 1894, *supra*, sec. 506; Interpretation Act, 1889 (52 & 53 Vict. c. 63), sec. 38.

⁶ Cf. sec. 93 (i); Merchant Shipping Act, 1894, *supra*, sec. 506; Interpretation Act, 1889 (52 & 53 Vict. c. 63), sec. 38. By the Merchant Shipping Act, 1894 (*supra*), it is provided in general terms, sec. 721.

^{6a} See sec. 65 and First Schedule.

By the Merchant Shipping Act 1894 (*supra*) the following documents are exempt from stamp duty :—

Indentures of apprenticeship to the sea service.⁷

Indentures of apprenticeship to the sea-fishing service and agreements with boys under the age of 16 with respect to that service.⁸

Submissions to and awards by superintendents of mercantile marine officers with reference to wages.⁹

Bill for wages of a seaman volunteering into the Navy drawn upon the owner of the ship and payable at sight to the order of the Accountant-General of the Navy.¹⁰

Bond given by the master of an emigrant ship.¹¹

Passenger's contract ticket given under the provisions of the Act.¹²

Passage broker's bond.¹³

Bonds and other documents relating to salvage by His Majesty's ships.¹⁴

Lighthouse dues and other payments accruing to or forming part of the mercantile marine fund and all instruments or writings used in carrying on the services for which these dues or payments are received.¹⁵

By the Pilotage Act 1913 (2 & 3 Geo. V. cap 31) the following document is exempt from stamp duty :—

Bond of licensed pilot.¹⁶

⁷ Sec. 108.

⁸ Sec. 395.

⁹ Sec. 137.

¹⁰ Sec. 196.

¹¹ Sec. 369.

¹² Sec. 320.

¹³ Sec. 342.

¹⁴ Sec. 563.

¹⁵ Sec. 731.

¹⁶ Sec. 35.

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